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REPORT OF CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF THE

TERRITORY OF ARIZONA

E. W. LEWIS
REPORTER

VOLUME 2

SAN FRANCISCO
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1904

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Rec. Apr. 21, 1904.

SUPREME COURT.

1885.

SUMNER HOWARD, Chief Justice.
D. H. PINNEY, Associate Justice.
W. F. FITZGERALD, Associate Justice.

OFFICERS OF THE COURT.

J. A. ZABRISKIE.....,U. S. District Attorney.
ZAN L. TIDBALL.....U. S. Marshal.
CLARK CHURCHILL.....Attorney General.
WILLIAM WILKERSON..... Clerk.[1]
ALBERT E. FOOTE..... Clerk.[2]

[1] Resigned January 8, 1885.
[2] Appointed January 9, 1885.

SUPREME COURT (Con't.)

1886.

J. C. SHIELDS, Chief Justice.
W. W. PORTER, Associate Justice.
W. H. BARNES, Associate Justice.

OFFICERS OF THE COURT.

OWEN T. ROUSE.....U. S. District Attorney.
W. K. MEADE.....U. S. Marshal.
CLARK CHURCHILL.....Attorney General.
ALBERT E. FOOTE.....Clerk.[1]
EZRA B. DODGE.....Clerk.[2]

[1] Resigned March 8, 1886.
[2] Appointed March 8, 1886.

SUPREME COURT (Con't.)

1887-1888.

JAMES H. WRIGHT, Chief Justice.
W. W. PORTER, Associate Justice.
W. H. BARNES, Associate Justice.

OFFICERS OF THE COURT.

OWEN T. ROUSE.....U. S. District Attorney.
W. K. MEADE.....U. S. Marshal.
BRIGGS GOODRICH.....Attorney General.
EZRA B. DODGE.....Clerk.[1]
WILLIAM WILKERSON.....Clerk.[2]

[1] Resigned March 17, 1888.
[2] Appointed March 17, 1888.

PREFACE.

Since the publication of volume one of the Arizona Reports in 1884 there have been no official reports of the decisions of the Supreme Court of the Territory of Arizona. The difficulties in now preparing complete and accurate reports have not been few. In the earlier years the court held its sessions in various parts of the Territory, at Tucson, Prescott and Phœnix, and doubtless this largely accounts for the regrettable lack of completeness in the files and records of the court. In many of the cases filed prior to 1894, when the court established its permanent seat at the capital, the original papers are missing; in others but a portion are to be found. The records of the court in these early years in such minor details as the names of counsel, from what court the appeal was taken, and the name of the trial judge, are incomplete, and in some instances contradictory. No opinions have been recorded in permanent form from 1877 to 1886, and a few opinions which appear in the first volume of these reports, as well as in the later Pacific Reporters, cannot now be found. The older minute records show a number of opinions as filed or to be filed which either never were filed or have since been lost. Quite a number of opinions have been found filed among the original papers and unrecorded which have not been heretofore published. It is needless to say that every effort has been made to find the missing files, and to ascertain the true state of the record, and, though it is not to be hoped that there are no errors, it is believed that there are none of serious moment. For such as appear the generous indulgence. so characteristic of the court and the profession is asked.

The scope of these reports is much the same as that of the California Reports, except that they constitute a complete record of all cases determined. All of the opinions have been

carefully verified by comparison with the originals, except in the few instances where no original is of record. In furnishing these missing opinions the courtesy of the West Publishing Company, the accuracy of whose reports is well known, is gratefully recognized.

All the head-notes have been re-written, and arranged in the order in which the court has considered the questions, thus facilitating reference to the text of the opinion. The wording of the opinion has been adhered to wherever possible for the same reason and to avoid misinterpretation. It has been considered wise to make the head-notes unusually full, particularly where the court has touched upon points of practice and questions of construction of local statutes. Many points have thus for the first time been rendered available.

Full abstracts of briefs of counsel have been inserted.

A table of cases cited, overruled, criticised and distinguished has been made.

There is a complete table of statutes cited and construed.

In all cases where an appeal has been taken to the Supreme Court of the United States reference is given at the end of the head-notes not only to the official reports but to the Lawyers Edition and the Supreme Court Reporter.

At the head of each case is given a citation of the volume and page of the Pacific Reporter where the opinion has been previously published.

The hearty co-operation of the publishers, Bancroft-Whitney Company, who have rendered invaluable assistance in the editorial work, and to whom is due the typographical merit of the reports, is cordially acknowledged.

If these reports shall serve to lessen the labor of the Bench and the Bar in determining the law of Arizona it will afford me much gratification.

E. W. LEWIS.

Phœnix, Arizona,
February 1, 1904.

TABLE OF CASES REPORTED

(MEMORANDUM DECISIONS OMITTED.)

Alexander v. Sherman 326
Alta Mining and Smelting Company v. Benson Mining and Smelting Company 362
Arizona Prince Copper Company, Copper Queen Mining Company, v. 10
Arizona Prince Copper Company, Copper Queen Mining Company, v. 169
Asher v. Cox 71
Atlantic and Pacific Railroad Company v. Lesueur 428

Balbridge, in re Estate of, ... 299
Barter v. County of Pima 88
Barth, Territory v. 319
Bashford, Campbell v. 344
Bashford v. Kendall 6
Bashford, Territory, ex rel. Atty. Gen., v. 246
Benson Mining and Smelting Company, Alta Mining and Smelting Company v. 362
Benson Mining and Smelting Company, McAllister and McCone v. 350
Berry, Reilly v. 272
Blake v. Thorne 347
Blackmore, Reilly v. 272
Blomberg, Territory v. 204
Board of Supervisors of Mohave Co., Territory, ex. rl. Sherman, v.. 248
Bones, Ordenstein v. 229
Broadway, Gant v. 315
Broadway, Mooney v. 107
Bryan v. Pinney 390

Caldwell, Dyke v. 394
Campbell v. Bashford, ... 344
Carlyon v. Fitzhenry 266
Charouleau, Woffenden v. 44

Charouleau, Woffenden v. 89
Charouleau, Woffenden v. 91
Christofferson, United States v. 29
Christofferson, United States v. (Rehearing) 127
Clark, Reilly v. 299
Clark v. Titus, ... 147
Clifford v. Larrieu 202
Connell, Territory v. 339
Clough v. Wing 371
Cook, Territory v. 383
Copper Queen Mining Company v. Arizona Prince Copper Company 10
Copper Queen Mining Company v. Arizona Prince Copper Company (Rehearing) 169
Cullum, Paul v. 16
Cox, Asher v. 71

Dalton v. Rentaria 275
Dalton, Romero v. 210
Davis, Territory v. 59
Dowling v. Hunt 8
Drake, Fechet v. 239
Dyke v. Caldwell 394

Ellis, United States v. 253
Ely v. New Mexico and Arizona Railroad Company 420
Fechet v. Drake 239
Fitzhenry, Carlyon v. 266

Gant v. Broadway 315
George, Jacobs v. 93
Gray v. Salt River Valley Canal Company, ... 225
Guild, Tweed v. 207

Hampson, Simms v. 233
Hart, United States v. 415
Hatch, Nigro v. 144
Hawkins, King v. 358
Heney v. County of Pima 257
Hickies, Philes v. 407
Hill v. Lenormand 354
Hine, Jeffords v. 162
Hobson v. New Mexico and Arizona Railroad Company 171
Hooper v. Stump 262
Hopkins, Miller v. 213
Hughes, Waller v. 114
Hunt, Dowling v. 8

Jacobs v. George 93
Jeffords v. Hine 162
Johnson v. Tully 214
Johnson v. Tully 223

Kendall, Bashford v. 6
Kemp, United States v. 29
Kemp, United States v. (Rehearing) 127
King v. Hawkins 358

Larrieu, Clifford v. 202
Lenormand, Hill v. 354
Lesueur, Atlantic and Pacific Railroad Company v. 428
Lord, Stiles v. 154

McAllister and McCone v. Benson Mining and Smelting Company.. 350
Melander, O'Toole v. 392
Miller v. Hopkins 213
Mohave, County of, Smith v. 27
Mooney v. Broadway 107
Mountain Maid Mining Company v. Reilly 272
Muldoon v. Place 4
Munroe, Territory v. 1

Neligh, Territory v. 69
New Mexico and Arizona Railroad Company, Ely v. 420
New Mexico and Arizona Railroad Company, Hobson v. 171
Nigro v. Hatch 144
Norton, Solomon v. 100

O'Doherty v. Toole 288
Ordenstein v. Bones 229
O'Toole v. Melander 392

Pacheco v. Wilson 411
Paul v. Cullum 16
Philes v. Hickies 407
Pima, County of, Barter v..... 88
Pima, County of, Heney v. 257
Pima, County of, Shaw v. 399
Pinney, Bryan v. 390
Place, Muldoon v. 4
Putnam v. Putnam 259

Reilly v. Berry 272
Reilly v. Blackmore 272

Reilly v. Clark 299
Reilly, Mountain Maid Mining Company v. 272
Rentaria, Dalton v. 275
Richmond, Territory v. 68
Rochester v. Sullivan 75
Romero v. Dalton 210

Salt River Valley Canal Company, Gray v. 225
Shaw v. County of Pima 399
Sherman, Alexander v. 326
Simms v. Hampson 233
Smith v. County of Mohave 27
Solomon v. Norton 100
Starr v. Stiles 436
Stiles v. Lord 154
Stiles v. Western Union Telegraph Company 308
Stiles, Starr v. 436
Stump, Hooper v. 262
Sullivan, Rochester v. 75

Tenney, United States v. 29
Tenney, United States v. (Rehearing) 127
Territory v. Barth 319
Territory ex rel. Atty. Gen., v. Bashford 246
Territory v. Blomberg 204
Territory, ex rel. Sherman, v. Board Supervisors of Mohave Co. .. 248
Territory v. Connell 339
Territory v. Cook 383
Teritory v. Davis 59
Territory v. Munroe 1
Territory v. Neligh 69
Territory v. Richmond 68
Territory, ex rel. Hawkins, v. Wingfield 305

Thorne, Blake v. 347
Tidball v. Williams 50
Titus, Clark v. 147
Tombstone Townsite cases 272
Toole, O'Doherty v. 288
Toole, Western Mining Company v 82
Tully, Johnson v. 214
Tully, Johnson v. 223
Tweed v. Guild 207

United States v. Christofferson 29
United States v. Christofferson (Rehearing) 127

United States v. Ellis 253
United States v. Hart 415
United States v. Kemp 29
United States v. Kemp (Rehearing) 127
United States v. Tenney 29
United States v. Tenney (Rehearing) 127

Waller v. Hughes 114
Western Mining Company v. Toole 82
Western Union Telegraph Company, Stiles v. 308
Williams, Tidball v. 50
Wilson, Pacheco v. 411
Wing, Clough v. 371
Wingfield, Territory, ex rel. Hawkins v. 305
Woffenden v. Charouleau 44
Woffenden v. Charouleau 89
Woffenden v. Charouleau 91

ARIZONA CASES.

CITED AND APPROVED.

Charouleau v. Woffenden, 1 Ariz. 243.....92, 154
Federico v. Hancock, 1 Ariz. 512..... 16
Miller v. Fisher, 1 Ariz. 232..... 91
Woffenden v. Charouleau, 1 Ariz. 346.....92, 154
Woffenden v. Charouleau, 2 Ariz. 91..... 154

OVERRULED, CRITICISED, AND DISTINGUISHED.

Charouleau v. Woffenden, 1 Ariz. 243, Overruled 45
Miller v. Fisher, 1 Ariz. 232, Criticised and Distinguished..... 154
Woffenden v. Charouleau, 2 Ariz. 44, Reviewed and Disapproved in Part 91

TABLE OF CASES CITED.

A

Abend v. Terre Haute R. Co., 111 Ill. 202 182
Adams v. Lee, 31 Mich. 440 .....146, 147
Adler v. Whitbeck, 44 Ohio St. 539 342
Aiken v. Smith, 21 Vt. 182 213
Albany etc. R. R. Co. v. Canaan, 16 Barb. 247 431
Albany etc. R. R. Co. v. Osborn, 12 Barb. 225 431
Allen v. Fox, 10 Am. Rep. 642 326
Allwood v. Ruckman, 21 Ill. 200 212
Anderson v. Brewster, 44 Ohio St. 576 342
Anderson v. State, 41 Wis. 326
Andrews v. City of Portland, 79 Me. 484 406
Appeal of North Beach etc. R. R. Co., 32 Cal. 506 430
Arnold v. Skaggs, 35 Cal. 687 186
Arnold v. State, 23 Ind. 170 325
Armour v. Hahn, 111 U. S. 313 182
Atchison v. Peterson, 20 Wall. 507 .....377, 381, 397
Auditors v. Benoit, 20 Mich. 176 404

B

Baird v. Bank of Washington, 11 Serg. Rawle 413 169
Baker v. Preston, 1 Gilmer (Va.) 235 ..... 389, 390
Baldwin v. Starks, 107 U. S. 463 166
Bangs v. Dunn, 66 Cal. 72 362
Bank v. Hastings, 15 Wis. 78 361
Bank v. Withers, 6 Wheat 107 391
Bank of Louisiana v. Mansker, 15 La. 115 220
Banking Association v. Place, 5 Duer 212 220
Barnes v. Sabron 10 Nev. 217 .....377, 382
Barney v. Martin, 91 U. S. 365 225
Barton v. Lovett, 8 N. Y. 483 251
Barton Coal Co. v. Cox, 39 Md. 1 367
Bartonshill Coal Co. v. McGuire, 3 McQueen 300 200
Bartonshill Coal Co. v. Reid, 3 McQueen 266 200
Basey v. Gallagher, 20 Wall. 670 .....358, 377, 381, 397
Bass v. Chicago etc. R. R. Co., 39 Wis. 636 314
Batten v. State, 80 Ind. 394 325
Batterson v. Chicago etc. R. R. Co., 49 Mich. 187 195
Beresford v. Gedes, L. R. 2 C. P. 285 104
Binney's Case, 2 Bland. 145 430
Bishop v. Tripp, 15 R. I. 466 342
Bliss v. Lawrence, 58 N. Y. 442 361
Bluffton v. Mathews, 92 Ind. 213 196
Bold v. N. Y. Central R. R. Co., 18 N. Y. 432 198
Boon v. Jones, 54 Ia. 699 389

Boren v. Smith, 47 Ill. 482 251
Bowman v. Watheen, 2 McLean 385 430
Breeze Co. v. Haley, 10 Col. 5 350
Brickell v. Batchelder, 62 Cal. 623 265
Brobst v. Brock, 10 Wall. 519 186
Brown v. Orr, 29 Cal. 122 298
Bruce v. United States, 17 How. 437 419
Buckeridge v. Ingram, 2 Ves. Jr. 654 430
Burke v. Munroe Co., 4 W. Va. 371 252
Burr v. Wilson, 18 Tex. 370 158
Burton v. Lies, 21 Cal. 87 74
Butte City Smoke House Lode Cases, 6 Mont. 397 274

C

Cain v. State, 20 Tex. 355 308
Calaveras County v. Brockway, 30 Cal. 326 251
Caldwell v. Hall, 60 Miss. 330 269
California v. R. R. Co., 127 U. S. 41 433
Canal Co. v. Hoyt, 57 Cal. 44 382
Carr, Estate of, 25 Cal. 586 301
Carroll v. Safford, 3 How. 441 371
Cash v. Spalding, 6 Mich. 193 153
Castner v. Gunther, 6 Minn. 135 153
Chace v. Trafford, 116 Mass. 532 232
Chaffin v. Doub, 14 Cal. 384 319
Charouleau v. Woffenden, 1 Ariz. 243 ..... 49, 92, 159
Chatterton v. Young, 2 Tenn. Ch. 768 161
Chicago v. Baer, 41 Ill. 306 431
Chicago v. Gage, 95 Ill. 593 389
Chicago M. & St. P. Ry. Co. v. Ross, 112 U. S. 377 ....185, 186, 200
Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205 200
Childress v. Cutter, 16 Mo. 24 159
Christy v. Dana, 34 Cal. 553 298
Church v. Drummond, 7 Ind. 17 80
Churchill v. Alpena Circuit Judge, 56 Mich. 536 64
City of Allentown v. Adams, (Pa.) 8 Atl. 430 342
City of Buffalo v. Holloway, 7 N. Y. 493 196
City of St. Louis v. Spiegel, 90 Mo. 587 342
Clark v. McKenzie, 7 Bush 523 252
Clark v. Smith, 13 Pet. 195 427
Clay Co. v. Savings Soc., 104 U. S. 579 308
Cleveland v. Tripp, 13 R. I. 50 329
Climer v. Hovey, 15 Mich. 18 426
Clinton v. Englebright, 13 Wall. 434 ..... 41, 135
Commissioners v. Anderson, 20 Kan. 298 404
Commissioners v. Mayrant, 2 Brev. 288 389
Commonwealth v. Castley, 118 Mass. 1 325
Commonwealth v. McPike, 3 Cush 181 64
Commonwealth v. Price, 10 Gray 472 67
Commonwealth v. Webster, 5 Cush. 320..... 326
Conley v. McDonald, 40 Mich. 150 192
Conner v. New York, 5 N. Y. 285 405
Cook v. Perry, 43 Mich. 623 104
Cosgrove v. Johnson, 30 Cal. 510 353
Cottle v. Spitzer, 65 Cal. 459 431
Cotton v. County Comm., 6 Fla. 610 80
Courchaine v. Bullion Mining Co., 4 Nev. 369 371

Cozzens v. Whitney, 3 R. I. 79 161
Crane v. Winsor, 2 Utah 248 382
Crans v. Hunter, 28 N. Y. 395 284
Creighton v. Kaneath etc., Irr. Co., 67 Cal. 221 379
Cummings v. Sharpe, 21 Ind. 331 161
Currey v. Davis, 1 Houst. 598 213
Curtis v. Sutter, 15 Cal. 259 426

D

Dance v. Seaman, 11 Grat. 778 80
Daniels v. Clegg, 28 Mich. 32 189
Davis v. Detroit & M. R. Co., 20 Mich. 105 198
Davis v. Gaines, 48 Ark. 370 342
Davis v. Western Union Telegraph Co., 1 Cin. Rep. 100 314
Deck v. Gherke, 6 Cal. 668 304
Deffeback v. Hawke, 115 U. S. 405 ..... 274, 369, 371
Dennis v. Table Mt. Water Co., 10 Cal. 370 85
Densmore v. State, 67 Ind. 306 325
Denver etc. R. Co. v. Conway, 8 Colo. 1 229
Derry v. Ross, 5 Colo. 295 329
Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99 178
Dickson v. Reynolds, 48 Mich. 178 127
Dickerson v. Colgrove, 100 U. S. 578 280
Dob v. Halsey, 16 John. 34 20
Dolan v. Mayor, 68 N. Y. 274 402
Dorsey v. Smith, 28 Cal. 21 405
Dougherty v. Henarie, 49 Cal. 686 171
Douglass v. State, 43 Wis. 395 105
Downey v. O'Donnell, 92 Ill. 559 238
Druse v. Wheeler, 22 Mich. 439 169
Duff v. Fisher, 15 Cal. 380 24
Dulton v. Shelton, 3 Cal. 206 232
Dumont v. Kellogg, 29 Mich. 420 379
Dunbar v. Mize, 53 Ga. 435 162
Dutton v. Willner, 52 N. Y. 312 99
Dyas v. Keaton, 3 Mont. 501 175

E

Eck v. Hoffman, 55 Cal. 502 232
Edelman v. St. Louis T. Company, 3 Mo. App. 503 314
Ehrlich v. Ewald, 51 Cal. 172 229
Elliott v. Fitchburg Co., 10 Cush. 193 379
Elliott v. Van Buren, 33 Mich. 49 14
Ellis v. Polhemus, 27 Cal. 350 298
Elwes v. Maw, 3 East 57 243
Evans v. Keeland, 9 Ala. 42 389
Ex parte Coburn, 1 Cow. 570 430
Ex parte Wall, 48 Cal. 279 251
Ex parte Wilson, 114 U. S. 429 207

F

Facey v. Fuller, 13 Mich. 527 169
Falow v. Butler, 21 Cal. 24 298
Farley v. Irrigating Company, 58 Cal. 142 358
Farmer's Bank v. Douglass, 11 Smedes & M. 469 80

Farmer's L. & T. Co. v. Hendrickson, 25 Barb. 494 431
Farrar v. Stackpole, 6 Greenl. 157 244
Farrell v. Enright 12 Cal. 452 14
Farwell v. Boston & W. R. Corp., 4 Metc. 49 ..... 181, 198, 200
Federico v. Hancock, 1 Ariz. 512, 25 Pac. 650 24
Fellows v. Smith, 40 Mich. 689 294
Fernandez v. Railway Co., 52 Cal. 45 178
Fisk v. Henarie, 15 Or. 89 261
Flint & P. M. Ry. Co. v. Stark, 38 Mich. 717 196
Forbes v. Gracey, 94 U. S. 762 329
Foster v. Browning, 4 R. I. 51 430
Frost v. Spitley, 121 U. S. 552 ..... 414, 426, 427
Fuller v. Ferguson, 26 Cal. 556 159
Furlong v. Riley, 104 Ill. 97 171
Fussell v. Gregg, 113 U. S. 550 308

G

Gagliardi v. Hoberlin, 18 Cal. 395 24
Galena C. U. R. Co. v. Fay, 16 Ill. 585 190
Galpin v. Page 18 Wall. 350 200
Gantret v. Egerton, L. R. 2 C. P. 371 196
Gardner v. Commercial Bank, 95 Ill. 298 80
Garwood v. Railway Co., 83 N. Y. 400 379
Gilman v. Eastern R. Corp., 10 Allen 233 .....183, 196, 198
Gilman v. City of Sheboygan, 2 Blackf. 510 122
Gilmore v. Northern Pac. R. Co., 18 Fed. 866 184
Gladwyn v. Hitchman, 2 Vern. 135 265
Glass v. Warwick, 40 Pa. St. 140 161
Glencoe v. People, 78 Ill. 389 252
Good v. Martin, 95 U. S. 90 218
Gooding v. Hingston, 20 Mich. 441 233
Gower v. Quinlan, 40 Mich. 572 14
Grand Rapids & I. R. Co. v. Judson, 33 Mich. 506 191
Grapengether v. Fejervary, 9 Ia. 163 161
Greeg v. Von Phul, 1 Wall. 274 279
Greeley v. Stilson, 27 Mich 154 367
Green v. Burke, 23 Wend. 502 169
Grogan v. Ruckle, 1 Cal. 193 171
Grover v. Wakeman, 1 Amer, Lead. Cas. 72 24
Guall v. Saffin, 44 Pa. St. 307 293
Gurley v. Hawkins, 2 Clark 175 169
Gurney v. St. Paul, 36 Minn. 163 261

H

Hafner v. Irwin, 23 N. C. (1 Ired.) 490 80
Hagan v. Walker, 20 Curt. Dec. 17 297
Harriman v. Stowe, 57 Mo. 93 64
Harris v. Finberg, 46 Tex. 79 161
Harrison v. Sterry, 5 Cranch 289 21
Hasey v. White Pigeon Beet Sugar Co., 1 Doug. (Mich.).... 85, 193
Hawes v. Knowles, 114 Mass. 518 314
Hawley v. Simons, 101 Ill. 654 171
Heaton v. Ferris, 1 Johns. 146 430
Henderson v. McTucker, 45 Cal. 647 74
Hicks v. Hinde, 9 Barb. 528 85
Hickman v. Jones, 9 Wall. 201 192

Hills v. Sherwood, 48 Cal. 393 297
Hoffman v. Mackall, 5 Ohio St. 124 80
Hogland v. Trask, 48 N. Y. 686 23
Hollister v. Loud, 2 Mich. 316 80
Holmes v. State, 9 Tex. App. 313 325
Hornbuckle v. Toombs, 18 Wall. 652 ..... 41, 135
Hough v. Railway Co., 100 U. S. 213 182
Houston & G. N. R. Co. v. Randall, 50 Tex. 621 178
Howard v. Bond, 42 Mich. 131 74
Hudson v. Davis, 43 Ind. 258 161
Hurd v. People, 25 Mich. 405 64
Hutchins v. Castle, 48 Cal. 155 284
Hylton v. United States, 3 Dall. 171 343

I

Iburg v. Suanet, 47 Cal. 267 14
Illinois Central R. Co. v. Welch, 52 Ill. 184 314
Improvement Co. v. Munson, 14 Wall. 448 192
Independence Town Co. v. DeLong, 11 Kan. 153 153
Insurance Co. v. Simmons, 131 Mass. 85 389
Iowa Homestead Co. v. Webster, 21 Ia. 221 122

J

Jackson v. Schmidt, 14 La. Ann. 807 314
Jacobs v. Louisville etc. L. R. R. Co., 10 Bush. 263 314
Jacobs v. Turner, 2 La. Ann. 964 220
Jennison v. Kirk, 98 U. S. 453 358
Johnson v. Townsley, 13 Wall. 72 167
Jones v. Adams, 19 Nev. 78 ..... 358, 379
Jones v. Crosthwaite, 17 Ia. 393 161
Jones v. People, 6 Colo. 452 15
Joyce v. Williams, 26 Mich. 332 279
Judkins v. Elliott, 12 Pac. (Cal.) 116 382

K

Kahn v. Telegraph Co., 2 Utah 174 371
Kaler v. Campbell, 13 Or. 596 ..... 358, 382
Keator v. People, 32 Mich. 484 169
Kee v. State, 28 Ark. 165 15
Keller v. Berry, 62 Cal. 488 329
Kihlberg v. United States, 97 U. S. 398 257
Kimball v. Gearhart, 12 Cal. 48 14
King v. Carpenter, 37 Mich. 363 426
King v. Davis, 34 Cal. 100 284
King v. Inhabitants of Butterton, 6 Term R. 554 280
King v. Moon, 42 Mo. 551 294
King v. Thomas, 6 Mont. 409 274
Kirk v. Hamilton, 102 U. S. 68 280
Knoth v. Barclay, 8 Colo. 305 171
Kohn v. Russell, 91 Ill. 138 162
Kruse v. Pringle, 8 Or. 158 79

L

Lake Shore etc. R. R. Co. v. Miller, 25 Mich. 274 189
Lander v. Beers, 48 Cal. 546 294
Langley v. Voll, 54 Cal. 435 74
Larimer Co. v. People, 8 Colo. 614 ..... 379, 382
Lay v. Nevill, 25 Cal. 553 319
Lee v. Figg, 37 Cal. 328 294
Lee v. Johnson, 116 U. S. 48 ..... 167, 168
Leech v. Ranch, 3 Minn. 448 153
Lehi Co. v. Moyle, 4 Utah 327 382
Leavenworth Co. v. Rice, 10 Kan. 426 314
Livingstone v. Coal Co., 5 App. Cases 25 366
Lobdell v. Simpson, 2 Nev. 274 382
Lodano v. State, 25 Ala. 64 37
Louisiana v. Taylor, 105 U. S. 454 308
Lux v. Haggin, 4 Pac. (Cal.) 919 ..... 358, 379, 382
Lux v. Haggin, 69 Cal. 255 382

M

Maclay v. Love, 25 Cal. 368 161
Mahon v. N. Y. Cent. R. R. Co., 24 N. Y. 658 431
Maguire v. Maguire, 3 Mo. App. 458 161
Maguire v. People, 44 Mich. 286 325
Major v. Symmes, 19 Ind. 117 161
Mangam v. Brooklyn R. R. Co., 38 N. Y. 455 178
Marmet v. State, 45 Ohio St. 63 342
Marquette etc. R. R. Co. v. Hanford, 39 Mich. 539 189
Marquette H. & O. R. Co. v. Marcott, 41 Mich. 433 196
Marquez v. Frisbie, 101 U. S. 473 167
Marye v. R. R. Co., 127 U. S. 117 434
Massey v. State, 1 Tex. App. 564 325
Matter of Corrigan, 37 Mich. 66 169
Mason v. Cotton, 4 Fed. 792 379
Mason v. Hill, 5 Barn and Adol. 1 381
May v. People, 8 Colo. 210 15
Maye v. Yappen, 23 Cal. 306 367
Mayfield v. Moore, 53 Ill. 428 404
Mayo v. Hutchinson, 57 Me. 546 161
McCabe v. Raney, 32 Ind. 309 389
McClintock v. Bryden 5 Cal. 100 381
McDonald v. Bear River Co., 13 Cal. 220 382
McDonald v. Minneapolis Lumber Co., 28 Minn. 262 244
McGuire v. Circuit Judge, 69 Mich. 593 426
McKecknie v. Ward, 58 N. Y. 541 389
McMurray v. Bassnett 18 Fla. 609 14
McLaran v. Mead, 48 Mo. 115 293
Merry v. Fremon, 44 Mo. 518 297
Merz v. Kaizer, 20 La. Ann. 377 220
Methodist Church v. Clark, 41 Mich. 730 426
Meux v. Howell, 4 East 1, 13 79
Miles v. United States, 103 U. S. 304 ..... 41, 43, 132, 325
Miller v. Fisher, 1 Ariz. 232 ..... 92, 159
Miller v. Newton, 23 Cal. 554 161
Minnesota Co. v. St. Paul Co., 2 Wall. 609 ..... 244, 245
Minnick & City of Troy, 83 N. Y. 514 189
Minger v. Jacobson, 100 Ill. 468 171
Mining Co. v. Defferrari, 62 Cal. 163 350

Mixon v. State, 55 Miss. 527 326
Mobly v. Clark, 28 Barb. 390 85
Monday v. State, 32 Ga. 672 65
Moody v. Whitney, 38 Me. 174 367
Moon v. Railroad Co., 8 Va. Law J. 540 200
Moore v. Clearlake Co., 5 Pac. (Cal.) 494 379
Moore v. Tice, 22 Cal. 514 26
Moran v. Palmer, 13 Mich. 367 426
Moranda Case, 93 Ill. 302 180
Morehant v. Wilson, 52 Cal. 263 329
Morley v. Town of Metamora, 78 Ill. 394 388
Morris v. Morris, 5 Mich. 180 297
Mosely v. Chamberlain, 18 Wis. 700 198
Murphy v. New York etc. R. R. Co., 29 Conn. 496 314
Myers v. Commonwealth, 83 Pa. St. 142 326

N

Nashville & D. R. Co. v. Jones, 9 Heisk. 27 200
Nelson v. Miller, 52 Miss. 410 161
New Brunswick v. Kirkpatrick, (N. J.) 7 Atl. 625 342
New Haven v. Fair Haven etc. R. R. Co., 38 Conn. 422 431
Nichols v. McLean, 101 N. Y. 526 406
Nicoll v. Munford, 4 John. Ch. 523 24
Nives v. Belknap, 2 Johns. 573 279
Noe v. Card, 14 Cal. 577 159
Northern etc. R. R. Co. v. Carland, 5 Mont. 146 430

O

O'Brien v. Foreman, 46 Cal. 81 158
Ogden v. Prentice, 33 Barb. 160 23
Oldfield v. New York & H. R. R. Co., 14 N. Y. 310 ..... 179, 188
Ophir Co. v. Carpenter, 4 Nev. 534 382
Ormsby v. Barr, 22 Mich. 80 426
Orr's Estate, 29 Cal. 104 298

P

Packard v. Arrellanes, 17 Cal. 537 158
Parke v. Kilham, 8 Cal. 78 279
Patterson v Wallace, 1 McQueen 748 178
Pechand v. Rinquet, 21 Cal. 76 298
Peck v. Herrington, 109 Ill. 611 379
People v. Ah Sing, 51 Cal. 372 326
People v. Beck, 58 Cal. 212 67
People v. Canal Appraisers, 33 N. Y. 482 382
People v. Cassidy, 46 N. Y. 46 431
People v. Cronin, 34 Cal. 191 37
People v. Detroit, 18 Mich. 338 252
People v. Finley, 38 Mich. 482 325
People v. Francisco, 38 Cal. 183 322
People v. Guidici, 100 N. Y. 403 325
People v. Jones, 20 Cal. 50 90
People v. Levison, 16 Cal. 98 3
People v. Lyle, 4 Pac. (Cal.) 977 15
People v. Miller, 24 Mich. 458 404
People v. Murray, 67 Cal. 103 37

People v. New York, 3 Johns. Cas. 79 252
People v. Reed, 5 Denio 554 210
People v. Reinhart, 39 Cal. 449 67
People v. Russell, 46 Cal. 121 67
People v. Shearer, 30 Cal. 656 126
People v. White, 24 Wend. 529 169
Peoria etc. R. R. Co. v. Thompson, 103 Ill. 209 ..... 245, 246
Peoria R. R. Co. v. Loomis, 20 Ill. 251 314
Perkins v. Elliott, 22 N. J. Eq. 127 ..... 161, 162
Philadelphia etc. R. R. Co. v. Maryland, 10 How. 376 ..... 122, 431
Pickerell v. Carson, 8 Iowa 544 245
Pickstock v. Lyster, 3 Maule & S. 371 ..... 79, 80
Pierce v. Emery, 32 N. H. 484 245
Pinkstaff v. People, 59 Ill. 148 388
Pittee v. Schipley, 46 Cal. 154 298
Pittsburg etc. Ry. Co. v. Devinney, 17 Ohio St. 209 198
Pittsburg etc. Ry. Co. v. Porter, 32 Ohio St. 333 15
Pixley v. Western R. R. Co., 33 Cal. 183 228
Pleasants v. Fant, 22 Wall. 122 192
Presbyterian Soc. in Waterloo v. Auburn etc. R. R. Co., 3 Hill 569..431
President etc. Adams Bank v. Anthony, 18 Pick. 238 389
Pringle v. Spaulding, 53 Barb. 21 14
Providence Bank v. Billings, 4 Pet. 514 ..... 122, 431
Providence Gas Co. v. Thurber, 2 R. I. 21 431
Pyle v. Pennock, 2 Watts & S. 390 245
Pyle v. Richards, 17 Neb. 180 379

Q

Quinby v. Conlan, 104 U. S. 420 167
Quincy Min. Co. v. Kitts, 42 Mich. 34 196

R

Randall v. Baltimore & O. R. R. Co., 109 U. S. 478 .....182, 198, 200
Railroad Co. v. Dennis, 116 U. S. 665 431
Railway Co. v. Gladman, 15 Wall. 401 179
Railroad Co. v. Morgan Co., 14 Ill. 166 431
Railroad Co. v. Stout, 17 Wall. 657 177
Railway Co. v. Miller, 112 Pa. St. 34 379
Railway Co. v. Slattery, 39 Law. T. (N. S.) 265 192
Railway Co. v. Sprague, 103 U. S. 756 266
Reed v. Bernal et. al., 40 Cal. 628 ..... 19, 25
Reed v. McIntyre, 98 U. S. 507 79
Re Estate of Carr, 25 Cal. 586 301
Red River Co. v. Wright, 30 Minn. 249 379
Red Rock v. Henry, 106 U. S. 596 308
Regina v. Brawn, 1 Car. & K. 144 142
Regina v. North Staffordshire Ry. Co. 3 El. & El. 392 245
Rey v. Simpson, 22 How. 341 218
Reynolds v. Bank, 112 U. S. 405 427
Reynolds v. United States, 98 U. S. 145 ..... 41, 63
Richardson v. Jones, 1 Nev. 406 15
Richardson v. Kier, 37 Cal. 263 229
Richardson v. McNulty, 24 Cal. 348..... 14
Richardson v. McNulty, 24 Cal. 339..... 329
Rogers v. Laytin, 81 N. Y. 642 171
Robinson's Ex'r. v. Richards, 15 Mo. 459 294
Robertson v. Corsett, 39 Mich. 777 146

Robertson v. Wilburn, 1 Lea 633 161
Roper v. Trustees of Sangamon Lodge, 91 Ill. 518 388
Rowbotham v. Wilson, 8 El. & Bl. 157 430
Russell v. Bank, 39 Mich. 671 162
Russell v. Hudson River R. R. Co., 17 N. Y. 134 183

S

Saulsbury v. Weaver, 59 Ga. 254 161
Schadt v. Heppe, 45 Cal. 433 298
Schilling v. Rominger, 4 Colo. 100 382
Scholey v. Rew, 23 Wall. 348 343
Scott v. Ward, 13 Cal. 471 159
Seaver v. Boston & Maine R. R. 14 Gray 466
Sichel v. Carrillo, 42 Cal. 505 298
Shepley v. Cowan, 91 U. S. 330 167
Shultz v. Depuy, 3 Abb. Pr. 252 9
Smith v. Hamilton, 20 Mich. 433 279
Smith v. Mayor, 37 N. Y. 578 405
Snedeker v. Warring, 12 N. Y. 170 .....245, 246
Stark v. Starrs, 6 Wall. 418 371
State v. Bridges, 29 Kan. 138 325
State v. Churchill, 15 Minn. 455 252
State v. Grammer, 29 Ind. 530 396
State v. Jones, 7 Nev. 408 15
State v. Moore, 12 Cal. 56 122
State v. Newton, 33 Ark. 276 390
State v. Reed, 62 Me. 162 325
State v. Rhodes, 6 Nev. 352 390
State v. Rover, 11 Nev. 348 325
State v. Shearer, 30 Cal. 645 122
State v. Sparrow, 3 Murph. 487 15
State v. Stearns, 11 Neb. 104 .....251, 252
State v. Walker, 5 S. C. 263 252
State v. West, 69 Mo. 401 15
State v. Williams, 5 Wis. 308 169
State v. Yellow Jacket S. M. Co., 5 Nev. 415 14
State Railroad Tax Cases, 92 U. S. 617 350
State Savings Bank v. Scott, 10 Neb. 83 161
Staup v. Commonwealth, 74 Pa. St. 458 63
Steamship Co. v. Pennsylvania, 122 U. S. 326 433
Stephens v. Mansfield, 11 Cal. 363 329
Stovall v. Banks, 10 Wall. 583 389
Stover v. State, 56 N. Y. 315 67
Strait v. Brown, 16 Nev. 317 382
Sutton v. Wauwatosa, 29 Wis. 21 191
Sweeney v. Schultes, 19 Nev. 53 175

T

Tabor v. Cook, 15 Mich. 322 426
Tanner v. Hills, 44 Barb. 428 213
Taylor v. Atlantic Nut Co., 2 Bosw. 106 196
Taxpayers etc. Assn. v. Kirkpatrick, 41 N. J. Eq..... 342
Teaff v. Hewitt, 1 Ohio St. 511 243
Tel. Co. v. Barnes, 64 N. Y. 385 389
Thredgill v. Pintard, 12 How. 36 126

Todd v. Bonnefoy, 123 Ill. 653 379
Todd v. Lee, 15 Wis. 400 161
Town of Highgate v. State, 59 Vt. 39 342
Townsend v. Stearns, 32 N. Y. 209 79
Truesdail v. Ward, 24 Mich. 117 104
Trustees v. Walters, 12 Ill. 6

U

Union Pac. Ry. Co. v. Diehl, 33 Kan. 422 14
Union Pac. Ry. Co. v. Dyche, 31 Kan. 120 379
United States v. Eckford, 6 Wall. 484 419
United States v. Gaussen, 19 Wall. 198 419
United States v. Girault 11 How. 27 389
United States v. Jones, 8 Pet. 384 419
United States v. Robeson, 9 Pet. 319 257
United States v. Simmons, 96 U. S. 360 37
United States v. Snow, 4 Utah 295 133
United States v. United States Bank, 8 Rob. (La.) 262 80
United States v. Walker, 22 How. 299 308
United States v. Wilkins, 6 Wheat. 136 .....418, 419
United States v. Wilson, 118 U. S. 86 426

V

Van Orsdol v. Railway Co., 56 Ia. 470 379
Van Sickle v. Haines, 7 Nev. 286 358
Van Winckle v. Hinckle, 21 Cal. 342 426
Veal v. Hurt, 63 Ga. 728 161
Veazie Bank v. Fenno. 8 Wall. 541 343
Vicksburg etc. R. R. Co. v. Dennis, 116 U. S. 665 123

W

Wabash Ry. Co. v. McDaniels, 107 U. S. 454 188
Wadleigh v. Janvrin, 41 N. H. 503 246
Wager v. Troy Union Ry. Co., 25 N. Y. 526 431
Walker v. Fitts, 24 Pick 191 213
Wallace v. New York, 18 How. Pr. 169 314
Ware v. Allen, 140 Mass. 513 379
Warner v. New York C. R. Co., 44 N. Y. 465 190
Water Co. v. Richardson, 72 Cal. 598 287
Watkins v. United States, 9 Wall. 759 419
Wattles v. Lapear, 40 Mich. 624 127
Weger v. Pennsylvania R. R. Co., 55 Pa. St. 460 198
Weiss v. Steel Co., 13 Or. 496 379
Welch v. Durand, 36 Conn. 182 314
Wheeler v. Bedell, 40 Mich. 693 146
Whipple v. Pope, 33 Ill. 334 79
Whipple v. Walpole, 10 N. H. 130 314
White v. Campbell, 25 Mich. 463 232
White v. Railroad Co., 50 Cal. 417 284
Wilcox v. Hausch, 54 Cal. 461 379
Wilder v. Fondey, 4 Wend. 100 80
Wilder v. Winnie, 6 Cow. 284 80
Wilkinson v. Wilkinson, 20 Tex. 242 159
Willard v. Eastham, 15 Gray 328 161
Williams v. New York Cent. R. R. Co., 16 N. Y. 100 431

Williams v. Townsend, 31 N. Y. 411 265
Willis v. Farley, 24 Cal. 498 298
Willson v. Broder, 24 Cal. 190 171
Wilson v. Castro, 31 Cal. 421 159
Wilson v. Charlestown, 8 Allen 138 190
Winchester v. Craig, 32 Mich. 205 367
Winfield Town Co. v. Maris, 11 Kan. 128 153
Witherspoon v. Duncan, 4 Wall. 210 371
Woffenden v. Charouleau, 1 Ariz. 346 .....92, 159
Wolfe v. Frost, 4 Sand. Ch. 86 430
Wooden-Ware Cases, 106 U. S. 432 .....366, 367
Wright v. Hays, 10 Tex. 133 159
Wright v. Howard, 1 Sun. & S. 190 379
Wright v. N. Y. Cent. R. R. Co., 25 N. Y. 493 196
Wright v. Simpson, 6 Vesey 714 389

Y

Yale v. Dederer, 18 N. Y. 265 160
Yale v. Dederer, 20 N. Y. 450 161
Yates v. Houston, 3 Tex. 452 159
Yeomans v. Contra Costa S. N. Co., 44 Cal. 71 184
Youngblood v. Sexton, 32 Mich. 406 343

Z

Zoll v. Soper, 75 Mo. 460 297

STATUTES CITED AND CONSTRUED.

UNITED STATES.

Constitution.—Art. 1, Sec. 8 .....342, 428
Art. 4, Sec. 3 204

REVISED STATUTES.

Revised Statutes, U. S., 1878, Sec. 886 .....253, 415
Revised Statutes, U. S., 1878, Sec. 951..... 415
Revised Statutes, U. S., 1878, Sec. 1014..... 50
Revised Statutes, U S., 1878, Sec. 1850.....433, 434
Revised Statutes, U. S., 1878, Sec. 1851.....204, 426, 434
Revised Statutes, U. S., 1878, Sec. 1891..... 204
Revised Statutes, U. S., 1878, Sec. 1934 390
Revised Statutes, U. S., 1878, Sec. 2339, 2340....354, 372, 381, 394, 398
Revised Statutes, U. S., 1878, Sec. 2387 .....151, 152
Revised Statutes, U. S., 1878, Sec. 5352 129
Supp. Rev. St. U. S., 1891, Chap. 47, 331..... 127
14 U. S. St. at Large, 292 428
22 U. S. St. at Large, 30 128
Act of Congress, March 3, 1885, 1 Supp. Rev. St. U. S., p. 485..... 223
Act of Congress, March 22, 1882 (Edmunds Act) 129

ENGLAND.

13 Elizabeth, Chap. 5 .....79, 293

ORGANIC ACT OF ARIZONA.

Rev. St. Arizona, 1901, par. 15 204
Rev. St. Arizona, 1901, par. 67 204
Rev. St. Arizona, 1901, par. 76 223

ARIZONA.

REVISED STATUTES, 1887.

Par. 133 436
Par. 938 390
Par. 2236 339
Par. 2239 339
Par. 2858 339
Par. 3201 394
Par. 3450 233

COMPILED LAWS, 1877.

Chap. 1, Par. 3, Sec. 3, Subd. 8 115
Chap. 2, Par. 55, Sec. 3 27
Chap. 10, Par. 408, Sec. 1 61
Chap. 10, Par. 359, Sec. 123 29
Chap. 11, Par. 503, Sec. 89 50
Chap. 11, Par. 590, Sec. 176 320
Chap. 11, Par. 592, Sec. 178 320
Chap. 11, Par. 699, Sec. 285 320
Chap. 11, Par. 701, Sec. 287 320
Chap. 11, Par. 757, Sec. 344 320
Chap. 24, Par. 1412, Sec. 1 248
Chap. 29, Par. 1569, Sec. 52, Subd. 11 300
Chap. 29, Par. 1584, Sec. 67 300
Chap. 29, Par. 1617, Sec. 100 299
Chap. 29, Par. 1647, Sec. 130 288
Chap. 29, Par. 1719, 1720, Sec. 202, 203 288
Chap. 30, Par. 1891, Sec. 1 29
Chap. 32 156
Chap. 32, Par. 1960-61-62-63, Sec. 1, 2, 3, 4 154
Chap. 32, Par. 1967, 1972, 1975, Sec. 1, 6, 9 45
Chap. 32, Par. 1967-1999 154
Chap. 32, Par. 2000, Sec. 1 ..... 91, 154
Chap. 33 114
Chap. 33, Par. 2005, 2006, 2018, Sec. 4, 5, 18 114
Chap. 33, Par. 2002, 2003, Sec. 1, 2 257
Chap. 33, Par. 2005, Sec. 4 428
Chap. 33, Par. 2020, Sec. 19 344
Chap. 33, Par. 2021, Sec. 20 344
Chap. 33, Par. 2062-2073 114
Chap. 36, Par. 2128, Sec. 15 315
Chap. 36, Par. 2133, Sec. 20 75
Chap. 43, Par. 2291-2-3-4, Sec. 3, 4, 5, 6 207
Chap. 45, Par. 2356, Sec. 21 29
Chap. 48, Par. 2471, Sec. 35 175
Chap. 48, Par. 2507, Sec. 71 175
Chap. 48, Par. 2557, Sec. 121 229
Chap. 48, Par. 2582, Sec. 146 89
Chap. 48, Par. 2596, Sec. 160 171
Chap. 48, Par. 2618, Sec. 182 100
Chap. 48, Par. 2630, 2631, Sec. 194, 195 259
Chap. 48, Par. 2631, Sec. 195, Subd. 3 100
Chap. 48, Par. 2686, Sec. 250 262
Chap. 48, Par. 2776-80, Sec. 340-44 350
Chap. 48, Par. 2785, Sec. 349 59

Chap. 48, Par. 2863, Sec. 427 299
Chap. 48, Par. 2871, Sec. 435 299
Chap. 48, Par. 2905, Sec. 469 248
Chap. 48, Par. 3073, Sec. 637 89
Chap. 53, Par. 3234, Sec. 3 435
Chap. 55, Par. 3240, 3242, 3243, Sec. 1, 3, 4 372
Chap. 61, Par. 3438, Sec. 7 29
Chap. 80, Par. 3633, Sec. 11 153
Chap. 82, Par. 3647, Sec. 4 107
Chap. 82, Par. 3648, Sec. 5 107

COMPILED LAWS, 1871.

Compiled Laws, 1871, Chap. 10, Sec. 123 29
Compiled Laws, 1871, Chap. 32, Sec. 1, 6, 9, pp. 306, 307 45
Compiled Laws, 1871, Page 310, Sec. 1, 2 45

COMPILED LAWS, 1864.

Howell's Code, Chap. 33, page 312 114

LAWS OF ARIZONA.

Laws 1879, Act No. 48, sec. 7, p. 72 259
Laws 1881, p. 116, sec. 1 420
Laws 1881, p. 156 100
Laws 1881, Acts No. 40 and 77 114
Act of February 12, 1881 27
Act of 1883, p. 157 246
Act of March 8, 1883 171
Laws 1883, Act 100 4
Laws of 1885, Act. No. 5, p. 5 45
Laws 1885, Act No. 22, p. 20 248
Laws 1885, Act No. 83 204
Laws 1885, Act No. 75, p. 138, sec. 31 305
Laws 1885, Act No. 102, p. 290, sec. 3 257
Laws 1885, Act No. 105, sec. 13 & 19, p. 105..... 305
Act of March 12, 1885 204

CALIFORNIA.

Code Civil Procedure, sec. 728..... 265

REVISED RULES

OF THE

SUPREME COURT

OF THE

Territory of Arizona.

AS AMENDED

ADOPTED JANUARY 7, 1887.

RULE I.

1. Applicants for license to practice as attorneys and counselors will be examined in open court, on the first day of each regular term, and on that day only. Persons applying for admission, whether upon examination or motion, must personally appear in court at the time the application for admission is made. No applicant shall be examined unless there shall have been filed with the clerk of the court, before the first day of the term at which the application is made, a certificate signed by at least two attorneys of the court, each of whom shall have been regularly engaged in practice as such attorneys for at least four years next theretofore, stating in substance that they have, and that each of them has, carefully and diligently examined the applicant touching the qualifications of such applicant in point of learning in the law; that it satisfactorily appeared to them, and each of them, upon such examination, that the applicant had been engaged in the study of the law for a period of time

to be named in the certificate, naming the place at which, and the person under whom, if any, such study had been prosecuted; that the applicant had, during that time, read certain books of law, which books shall be enumerated in the certificate; and stating any other fact tending to show the character of the attainments of the applicant, and also, stating that in their opinion the applicant possesses the requisite qualifications in point of learning in the law to be entitled to be admitted to practice.

2. The fee for licence must in all cases be deposited with the clerk of the court before this application is made, to be returned to the applicant in case of rejection.

3. Ex-members of the supreme court of the territory shall be entitled to admission without motion and without being present; upon application to the clerk of the court the certificate shall be issued to them without the order of the court.

RULE II.

1. The Applicant in a civil action shall, within forty days after the appeal is perfected and the undertaking on appeal has been filed, file the transcript of the record, duly certified to be correct, by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken.

2. The time above limited may be extended by order of one of the judges of the supreme court; and such extension of time shall be granted only upon good cause shown by affidavit.

3. If the transcript be filed in vacation, and more than thirty days before the meeting of the court, the appellant shall, within ten days after filing the transcript and abstracts, file his printed brief, and the appellee shall have fifteen days thereafter in which to file his briefs and appellant five days in which to reply. If the transcript be filed in term, or less than thirty days before the term, the brief of the appellant shall be filed with the same.

4. No cause shall be argued orally by a party who has not filed a printed brief.

5. In criminal cases the transcript shall be filed within thirty days after the appeal is taken.

RULE III.

1. On motion to dismiss an appeal, for a failure to file the transcript within the prescribed time, there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment or order appealed from, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears, the fact and date of filing the said undertaking on appeal, and that the same is in due form; the fact and time of the settlement of the bill of exceptions and the statement on appeal, if there be any; and, also, that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record, or if he has made such request, that he has not paid the fees therefor, if the same have been demanded.

2. On motion to dismiss the appeal on any other ground than the failure to file the transcript within the prescribed time, the moving papers shall consist of the certificate of the clerk of the court below, as to any of the matters above mentioned, or of affidavits, or both such certificate and affidavits.

3. Copies of the moving papers, except the transcript, shall be served with notice of the motion.

4. If an appeal be taken and perfected in the form required by statute, after the expiration of the time limited by law for the taking of such appeal, the respondent may, under the provisions of this rule, move to dismiss such appeal on that ground, whether the time for filing the transcript has expired or not.

5. When an appeal has been dismissed under the provisions of this rule, a certificate of that fact shall be transmitted to the clerk of the court below forthwith, under the seal of this court, unless stayed by an order of the court or three justices thereof.

RULE IV.

1. In all causes the party bringing an action into this court shall file with the transcript a complete abstract or abridgement of the record therein, referring to the appropriate pages of the record by numerals on the margin, and shall cause such abstract to be printed in a neat and workmanlike manner, with small pica type, on one side only, upon white foolscap paper, leaving a margin at least two inches in width on the left-hand side of each sheet and bound on the left-hand side of the pages. Typewriter may be used, paper and binding to be the same as the above. Six copies of such printed abstract shall be filed in each case—one for each of the justices, one for the defendant in error or appellee, one for the reporter and one to be filed with the clerk.

See amendment, September 29, 1887, following Rule XXXVII.

2. In all cases where the evidence shall be taken and written out by a short-hand reporter, and shall be embodied in the transcript, the same shall not be printed in the abstract as returned by such reporter, but the same shall be by appellant condensed so as to present the substance of such evidence clearly and concisely in the abstract.

3. The appellee's counsel shall be permitted, if he is not satisfied with the abstract or abridgement furnished by the plaintiff's counsel, to furnish each of the justices of this court with such further abstracts as he shall deem necessary to a full understanding of the merits of the cause.

4. Printed briefs will be required in all cases, whether argued orally, in full or in part only, or when submitted on briefs without oral argument. They shall be printed and bound as is required for abstracts. The briefs required should contain a short, clear statement of the points, and the authorities in support thereof; and in citing cases from published reports, counsel will be required not only to give the book and page, but also the name of the parties as they appear in the title of the reported case; and the names of

counsel filing brief or abstract must appear to the same. But the filing of a printed brief shall not preclude the party from filing full printed or written arguments in support of his brief of points and authorities, provided he does so within the time his printed brief is required to be filed.

5. Six copies of the briefs of each party must be filed in each case, one for each of the judges, one for the opposite party, one for the reporter, and one to be filed with the clerk.

RULE V.

1. The pleadings, proceedings, and statement shall be chronologically arranged in the transcript, and each transcript shall be prefixed with an alphabetical index, specifying the folio of each separate paper, order, or proceeding, and of the testimnoy of each witness, and the transcript shall have at least one blank fly-sheet cover.

2. The chronological arrangement of the several parts of the transcript, and a strict compliance with the other requirements of this rule, will be exacted of the appellant or party filing the record here in all cases by the court, whether objection by the opposite party be made or not; and for any failure or neglect in these respects, which is found to obstruct the examination of the record, the appeal may be dismissed.

RULE VI.

1. Whenever a map or survey forms part of the transcript, it shall not be necessary to furnish more than one copy thereof, which shall be annexed to the transcript filed with and certified by the clerk, and reference thereto shall be made in the other copies.

RULE VII.

1. No transcript, or other paper or document, which fails to conform to the requirements of these rules, shall be filed by the clerk.

RULE VIII.

1. If a party shall present to the attorney of the adverse party a transcript on appeal, in a civil case, and request his certificate that the same is correct, and said attorney, upon such request, shall, for a period of five days, neglect or refuse to join in such certificate, or, if deemed incorrect, shall neglect or refuse, for the same time, to serve upon the party making the request, a written statement of the particulars in which the transcript is incorrect; or upon the presentation of the transcript corrected in the particulars thus specified, shall still neglect or refuse, for a period of two days, to join in such certificate, the costs of procuring the certificate to such transcript from the clerk of the proper court shall be taxed against the party whose attorney so neglects or refuses.

RULE IX.

1. The expense of printing abstracts on appeal in civil causes, and pleadings, affidavits, or other papers constituting the record in original proceedings upon which the case is heard in this court, required by these rules to be printed, shall be allowed as costs, and taxed in bills of costs in the usual mode.

RULE X.

1. For the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing, and, upon good cause shown, obtain an order that the proper clerk certify to this court the whole or part of the record, as may be required, or may produce the same duly certified, without such order. If the attorney or counsel of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion, except when a certified copy of the omitted record is produced at the time, must be accompanied by an affidavit, showing the existence of the error or defect alleged.

RULE XI.

1. Exceptions or objections to the transcript, statement, the bond or undertaking on appeal, the notice of appeal, or to its service, or any technical exception or objection to the record in civil causes affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken and noted in the printed points of the respondent, required to be filed and served in writing, at least five days before the hearing, or they will not be regarded; and when so noted, it shall be the duty of the appellant to present and file at the hearing of the cause such additional record, certificate, or other matter, if such there be, to remove or answer the objection or exception so taken; otherwise such objection or exception, if well taken, shall prevail.

RULE XII.

1. Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit, by suggestion in writing, on the part of such representative, or of any party on the record. Upon the entry of such suggestion, an order of substitution shall be made, and the cause shall proceed as in other cases.

RULE XIII.

1. One week before the commencement of the term, the clerk shall, unless ordered by the court, place on the calendar all causes which have been continued from the previous term; also, all causes in which the transcripts shall theretofore have been filed. Other causes in which the transcripts have been filed may be placed on the calendar on the stipulation of the parties. Causes may be placed on the calendar on the motion of the respondent—five day's notice of the motion being given—when the appellant has failed to file the transcript, as prescribed by Rule 2. When the transcript in a criminal cause is filed, after the calendar is made up, the cause may be placed thereon by consent, or on the motion of the defendant.

RULE XIV.

1. In all cases where a paper or document is required by these rules to be printed, it shall be printed upon similar paper and in the same style and form (except the numbering of the folios in the margin) as is prescribed for the printing of abstracts.

RULE XV.

1. No more than one counsel on a side will be heard upon the argument, except in peculiar and important cases; but each defendant who has appeared separately in the court below, may be heard through his own counsel. The counsel for each party will be allowed only one hour, unless an extension of time be obtained from the court before the argument is commenced.

RULE XVI.

1. All opinions delivered by the court, after having been finally corected, shall be recorded by the clerk.

RULE XVII.

1. The manner of applying for a rehearing shall be as follows: Within fifteen days after an opinion is filed, a party desiring a rehearing shall give actual notice in writing to the opposite party or to his attorney, of his intention to make such application, and shall also, within the same time, file a copy of such notice with the clerk of this court, and within forty days after the filing of the opinion, shall place on file in the clerk's office six printed copies of the petition.

2. Application for a rehearing of any cause shall be made by petition to the court, signed by the counsel, briefly stating the grounds for a rehearing, and the authorities relied on in support thereof. When a rehearing is granted, notice shall be given to the opposite party that such rehearing will be had.

3. When an opinion in any case is filed, and a petition for a rehearing shall be presented to either of the justices of this court, if he shall certify that there is probable grounds

for granting a rehearing, all further proceedings authorized by the judgment of this court shall be stayed until the next term of the court.

4. When, in any case, a rehearing is granted, it shall be placed for hearing at the foot of the docket.

The petition for rehearing shall stand as the printed argument, on the hearing of the party in whose favor it is granted.

The opposite party shall, in all such cases, have ten days from the time of granting the rehearing to reply to the petition, and the petitioner shall have five days to file his closing argument, which shall end the argument of the case, and it shall then stand for final decision.

When an oral argument is allowed, if the party against whom the rehearing is granted wishes to avail himself of the permission to argue orally, his reply brief must be filed on or before the calling of the cause.

Oral argument on both sides, when allowed, shall close the arguments in the case.

RULE XVIII.

1. No remittitur shall issue until after the expiration of twenty-five days from the entry of the judgment or order, unless upon the order of the court, or of three of the justices; provided, that when an appeal is dismissed for any cause, the remittitur in case the transcript shall have been filed in this court, shall issue forthwith, unless stayed by an order of the court or three justices thereof; and in case no transcript shall have been filed, then a certificate of dismissal shall be forthwith issued, as provided in subdivision five of Rule 4.

RULE XIX.

1. The proof of service of notice and affidavits, or writ of affidavits, shall be the same as the proof of service of summons in similar cases. After the return day has passed, upon filing due proof of service of notice and affidavits in an application for a peremptory mandate, or of the affidavits and alternative writ, when the alternative writ has been issued,

as provided by these rules, and that no answer has been served and filed as herein provided; upon application of the moving party, the clerk shall place the cause upon the calendar for hearing, on the first day of the term, or such other day as may be specially appointed by the court, upon the papers of the applicant; and the application shall be heard upon such papers, unless the court, upon motion on notice and affidavits, shall relieve the respondent from his default, on the ground of mistake, inadvertance, surprise, or excusable neglect, and permit an answer to be filed.

RULE XX.

1. When a peremptory writ of mandate is awarded it shall issue immediately, unless stayed by special order of the court.

RULE XXI.

1. An appeal or writ of error may be dismissed at any time, upon and in accordance with the written stipulation of the attorneys of record of the respective parties, and upon and in accordance with such stipulation, the clerk shall enter such dismissal, and the remittitur shall issue thereon in accordance with the terms of said stipulation.

RULE XXII.

1. When the inspection of an original paper, which was offered in evidence in the court below, is shown to be necessary to a correct decision of the appeal, the court may order the clerk of the court below to transmit such original paper, if in his possession, to the clerk of this court; and if such paper be in the possession of a party to the action, he may produce the same on the hearing of the cause, or he may, upon motion and notice of the adverse party, be required to produce such paper on the hearing of the cause; and in default thereof, the court will intend the paper to be, in all respects, as alleged by the opposite party.

RULE XXIII.

1. In any application made to the court for a writ of mandamus, certiorari, prohibition, procedendo, or for any prerogative writ to be issued in the exercise of its original jurisdiction, and for which an application might have been lawfully made to some other court in the first instance, the affidavit or petition shall, in addition to the necessary matter requisite by the rules of law to support the application, also set forth the circumstances which, in the opinion of the applicant, render it proper that the writ should issue originally from this court, and not from such other court—the sufficiency or insufficiency of such circumstances so set forth in that behalf will be determined by the court in awarding or refusing the application. In case any court, judge, or other officer, or any board or other tribunal in the discharge of duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceedings—and in such case it shall be the duty of the applicant obtaining an order for any such writ, to serve or cause to be served upon such party or parties in interest a true copy of the affidavit or petition and of the writ issued thereon, in like manner as the same is required to be served upon the respondent named in the application and proceedings, and to produce and file in the office of the clerk of this court the like evidence of such service.

RULE XXIV.

1. In all cases where notice of a motion is necessary, unless for good cause shown, the time is shortened by an order of one of the justices, the notice shall be five days, and one day for every twenty-five miles distant from the point where the motion is to be heard, and between points where there is regular communication by United States mail.

RULE XXV.

1. When a judgment is reversed or modified, a certified

copy of the opinion in the case, if there be any, shall be transmitted, with the remittitur, to the court below.

RULE XXVI.

1. No paper shall be taken from the court room or clerk's office, except by order of the court, or of one of the justices. No order will be made for leave to withdraw a transcript for examination except upon leaving with the clerk a written receipt therefor.

RULE XXVII.

1. Writs of certiorari may be issued by the clerk, upon the order of any justice of the supreme court, on the filing of a petition therefor, and shall be returnable within thirty days.

RULE XXVIII.

1. When cases are placed upon the calendar, parties shall be primarily liable for costs, as follows: First, if by the appellant, he shall first be liable; second, if by the respondent, or by consent, then both parties. In civil cases the clerk shall not be required to remit the final papers until the costs are paid. In all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no direction as to costs of appeal, the clerk will enter upon the record and insert in the remittitur a judgment that the appellants recover the costs of the appeal.

RULE XXIX.

1. Whenever the transcript and abstracts and briefs shall have been filed as required by law, or the time for filing the same has expired the cause shall stand for hearing, and no further or amended brief shall be filed, except when special order of the court permits. Causes that stand for hearing shall be called in their order beginning on the second day of the term, and shall be submitted as called. The oral arguments shall at that time be made. Upon the call, after oral argument, the cause shall be deemed submitted.

2. When the appellant has failed to file the transcript and abstract as required by rule 2, appellee may docket the cause and on his motion the appeal will be dismissed. For this purpose he shall be required to file no more than a certified copy of the undertaking on appeal.

RULE XXX.

1. All applications to this court for peremptory writs of mandate must be noticed for the first day of the term. The notice shall require the respondent to serve and file his answer within the time hereinafter specified, and notify him that if he fails to answer within the time prescribed, the application will be heard on the moving papers, on the first day of the next term. The notice of the application, together with a copy of the affidavit and other papers upon which the application will be based, shall be served on the respondent at least twenty days before the said first day of the term, unless the court or one of the justices shall shorten the time. As soon as practicable after such service, the said notice, affidavit, and other papers, together with the evidence of service, shall be filed by the applicant with the clerk of this court. Within the time mentioned in the notice the respondent shall file his answer, and serve a copy thereof on the applicant or his attorney.

RULE XXXI.

1. When the application is for an alternative writ, the affidavit upon which the application is made shall be filed with the clerk before the issuing of the writ, and a copy of the same shall be served with the writ. The writ shall command the party to do the act required to be performed or show cause why he has not done so, by filing his answer thereto within the time specified in said writ, as hereinafter provided, and shall notify the respondent that on failure so to do, the application for the peremptory writ will be heard on the papers of the moving party on the first day of the next succeeding term, or upon such day in term as may be appointed by the court, when a special return day has been inserted by the court. The return day specified in

the writ shall be twenty days after service of a copy of the writ and affidavit; or, if the court appoint a special return day, then the day so appointed. Within the time so designated for the return of said writ the respondent shall either do the act required to be performed, or file with the clerk his answer to the writ and affidavit, and serve a copy thereof on the applicant.

RULE XXXII.

1. In proceedings relating to writs of mandate, preliminary motions necessary to be disposed of before the cause is placed upon the calendar for final argument will be heard on the first day of the term.

RULE XXXIII.

1. If, in such proceedings, an answer be filed which raises an issue of fact essential to the determination of the application, the question of fact will be directed to be tried by a jury, before some district court, to be designated in the order; or, where the parties so agree, by a referee; and the argument will be postponed till the verdict or finding upon such issue of fact shall be duly certified to this court.

RULE XXXIV.

1. The final argument in proceedings for writs of mandate, whether upon questions of law arising upon the papers in the case, or upon the facts, as found by a jury or referee, will be heard on the first Tuesday of the first week of the term, or at such other time as the court may by order direct. A calendar of such causes will be made out for that day, upon which the clerk will place all applications for mandate ready for final hearing. All applications for writs of mandate not ready for hearing on said day (unless for special reasons otherwise directed) will be continued to the next succeeding term of the court.

RULE XXXVI.

1. Cases argued or submitted for decision in term, may be decided, and decision and judgment may be rendered in vacation; and the decision and judgment rendered, by a majority of the justices in vacation, shall have the same force and effect as a decision and judgment rendered by the court, in term; and remittitur shall be issued thereon by the clerk of the court, as upon a judgment rendered in term.

RULE XXXVII.

1. In all civil cases the appellant shall deposit twenty dollars and the respondent ten dollars, with the clerk of the court, before filing any papers on appeal.

Rule IV, §1, is amended to read as follows:

"In all causes the party bringing an action into this court shall file with the transcript a complete abstract of the record therein, referring to the appropriate pages of the record by numerals on the margin, and shall cause such abstract to be printed in a neat and workman-like manner on one side only, upon paper suited to the use of ink; the pages to be the same size as those of the PACIFIC REPORTER, and bound on the side of the page. Six copies of the same shall be filed in each case."

Adopted September 29, 1887.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

Territory of Arizona,

During the Year 1885.

[Criminal No. 31. Filed April 4, 1885.]

[S. C. 6 Pac. 478.]

THE TERRITORY OF ARIZONA, Plaintiff and Respondent, v. JAMES MUNROE, Defendant and Appellant.

1. CRIMINAL LAW—CRIMINAL PRACTICE—RECORD ON APPEAL—REPORTER'S TRANSCRIPT—NECESSITY FOR—BILL OF EXCEPTIONS—REVIEW OF ERRORS IN RECORD.—The law of the Territory requiring the reporter in all criminal cases to file certified copy of the testimony, rulings of the court, with exceptions taken thereto, does not do away with the necessity of a bill of exceptions, and in the absence of such bill of exceptions the only errors of which this court can take notice arise from the record.

2. SAME—SAME—WAIVER OF WRITTEN INSTRUCTIONS IN CRIMINAL CASES—ORAL INSTRUCTIONS TO JURY IN CAPITAL CASES CONDEMNED—ABSENCE OF BILL OF EXCEPTIONS—PRESUMPTION OF CORRECTNESS OF ACTION OF TRIAL COURT—REVIEW OF MANIFEST ERROR IN RECORD WITHOUT BILL OF EXCEPTIONS.—In some of the states where the statute requires the instructions to be in writing, as in this territory, it has been held that the same cannot be waived in a criminal and especially in capital cases. It is a dangerous practice for the trial court to give verbal instructions in a capital case. The defendant must show in what the error in refusing an instruction

consists before he can ask for a reversal of a judgment, and when no bill of exceptions is filed, the presumption must be in favor of the correctness of the action of the court, unless sufficient is shown by the record to satisfy the appellate court that the action of the lower court is manifestly erroneous under any and every conceivable state of facts. In such case it will be reviewed, notwithstanding there is no bill of exceptions.

3. SAME—FAILURE TO INSTRUCT AS TO NECESSITY OF PROOF OF CORPUS DELICTI ERROR.—It is the duty of the court to charge the jury that a conviction for murder cannot be sustained when the *corpus delicti* is not proven and the refusal of request for such charge is manifest error.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. Reversed.

The facts are stated in the opinion.

J. J. Hawkins, M. V. Howard, and E. M. Sanford, for Appellant.

Clark Churchill, Attorney General, for Respondent.

PINNEY, J.—The defendant was indicted at the November term, 1883, of the court for the murder of Jack Shae, was tried, convicted of murder in the first degree, and sentenced to be executed. With the transcript of record appears what purports to be the evidence given at the trial. There is no bill of exceptions settled and certified to by the court. By the laws of this territory it is made the duty of the reporter, in all criminal cases, within five days to file a certified copy of the testimony, rulings of the court, with the exceptions taken thereto; and his certificate when so made shall be *prima facie* evidence of its correctness. This being done in this case, it is claimed by counsel for defendant that this evidence becomes a part of the record, the same as if a bill of exceptions had been made. This law does not and cannot be held to do away with the necessity of a bill of exceptions, and the only alleged errors of which we can take notice arise from the record.

A number of instructions were asked by the defendant,

some of which were given and some refused. Among the instructions so asked was the following:

"The court instructs the jury that if they believe from the evidence that the government has failed to prove that death ensued from the wound given deceased by defendant, they must acquit."

This was refused, but no reason given as to why it was refused. The attorney general insists that as there is no bill of exceptions, and written instructions having been waived by defendant's counsel, that it must be presumed that the proof was sufficient, and that the court refused the instruction asked because already given in the charge by the court. In some of the states where the statute requires the instructions to be in writing, as in this territory, it has been held that the same cannot be waived in criminal and especially in capital cases. To say the least, it is a very dangerous practice for the trial court to give verbal instructions in a capital case. This might be obviated if the charge were taken down by the stenographer, copied, revised at once by the court, and filed with the clerk as part of the record.

In this case it is said the oral charge given by the court has been lost or destroyed. Had the court refused the above instructions, because already given in the general charge by the court, it would have been easy to have so stated on the decision in refusing the instruction. It is for the defendant to show in what the error consists before he can ask for a reversal of a judgment, and when no bill of exceptions is in the record, we must presume in favor of the correctness of the action of the court, unless sufficient is shown by the record to satisfy the appellate court that the action of the lower court is manifestly erroneous under any and every conceivable state of facts. Then it will review it, notwithstanding there is no bill of exceptions in the case. *People* v. *Levison*, 16 Cal. 98, 76 Am. Dec. 505.

The defendant had a right to have the instructions asked given to the jury. It needs no bill of exceptions to determine this. It would be folly to argue that a conviction for murder could be sustained when the *corpus delicti* is not proven. It was a question which it was the duty of the jury to pass upon,

and if not proven, it was their duty to acquit, and it was the duty of the court to so charge them, and the refusal of the request to make such charge was manifest error.

Judgment reversed, and new trial ordered.

Howard, C. J., and Fitzgerald, J., concurring.

[Civil No. 122. Filed April 4, 1885.]

[S. C. 6 Pac. 479.]

JOHN MULDOON et al., Plaintiffs and Appellants, v. O. F. PLACE et al., Defendants and Respondents.

1. PLEADING—DILATORY PLEAS AND MOTIONS—MUST BE FILED PROMPTLY OR RIGHT LOST.—All dilatory pleas or motions must be pleaded in apt time,—that is, at the earliest practicable moment,—or the right to plead or make the motion will be waived.

2. PRACTICE—MOTION TO DISMISS FOR WANT OF COST BOND DILATORY—RIGHT TO MAKE MOTION LOST AFTER DEMURRER FILED.—A motion to dismiss for want of a bond for costs is a dilatory motion, and if not interposed in the first instance is waived. After filing a demurrer it is then too late to ask for and require plaintiffs to file a bond for costs, and it is error to allow defendants' motion to dismiss for want of cost bond.

3. LAWS 1883, ACT 100, CITED.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. Reversed.

The facts are stated in the opinion.

Rush and Herndon, for Appellants.

The defendants Cline, Porter and Fares waived their right to ask for a dismissal for want of bond by filing their demurrer to plaintiff's complaint, for the reason that all technical irregularities must be taken advantage of at the

earliest opportunity; and any appearance, or pleading, of any kind, made, or filed, after the accruing of such technical irregularity is a waiver of the right to take advantage of such irregularity. *Parker* v. *Williams,* 4 Paige Ch. (N. Y.) 489; Thompson Prov. Rem. 447; Drake on Attachment, Secs. 112, 144 (4th Ed.); *Nichols* v. *Nichols,* 10 Wend. 560; *Hart* v. *Small,* 4 Paige Ch. (N. Y.) 288.

Churchill and Dann, for Respondents.

The fact being admitted that no bond was filed at the commencement of the suit the judgment of dismissal should be affirmed.

PINNEY, J.—This action was commenced to recover the possession of a mining claim. The complaint was filed August 27, 1883. A demurrer to the complaint was filed October 8, 1883. November 8, 1883, a motion was made to dismiss the case for a failure of plaintiff to comply with an act entitled "An act to suppress vexatious litigation;" in other words, for failure of plaintiffs to give a bond for costs, including attorney's fees, before commencing suit. This the laws of March, 1883, require to be done in all cases sounding in tort, or for any interest in real estate not evidenced by writing. The bond is to be signed by two good and sufficient sureties. No provision is made for the approval of the bond, and no mention is made as to what the amount of the bond should be. It does provide that for a failure to comply with the law on part of plaintiff the action shall be by the court dismissed. Upon the motion so made this action was by the court below dismissed, from which said order of dismissal the plaintiffs appeal to this court.

Were it not for the fact that the law in question had been repealed by the legislature, we should comment upon the constitutionality of the same; but as this case must be reversed upon another point, we deem it unnecessary to discuss that question.

It is not necessary to cite authorities upon the proposition that all dilatory pleas or motions must be pleaded in apt time—that is, at the earliest practicable moment—or the

right to plead them or make the motion will be waived. A motion to dismiss for want of a bond for costs is a dilatory motion, and if not interposed in the first instance is waived. *Trustees* v. *Walters,* 12 Ill. 154. After filing a demurrer it was then too late to ask for and require plaintiffs to file a bond for costs, and the court below erred in allowing defendants' motion to dismiss.

Judgment and order reversed, and cause remanded for further proceedings.

Howard, C. J., and Fitzgerald, J., concurring.

[Civil No. 129. Filed May 25, 1885.]

[S. C. 7 Pac. 176.]

L. BASHFORD et al., Plaintiffs and Respondents, v. GEORGE D. KENDALL, Defendant and Appellant.

1. VERDICT—UNCERTAINTY—PRACTICE TO REMEDY—NOT CURED BY JUDGMENT.—Where a verdict is too uncertain to justify judgment the jury may be requested to retire and put it in proper form, but where the verdict is bad for uncertainty it cannot be corrected or cured by judgment.

2. APPEAL AND ERROR—VERDICT INCORPORATED INTO JUDGMENT VERBATIM IS BEFORE COURT WITHOUT BILL OF EXCEPTIONS.—A verdict, copied verbatim into a judgment, is before the court on appeal the same as if brought up by a bill of exceptions.

Rehearing denied March 3, 1885.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. Reversed.

The facts are stated in the opinion.

Chas. B. Rush and John Howard, for Appellant.

Rush and Wells, and Clark Churchill, for Respondents.

PINNEY, J.—This was an action in ejectment for the recovery of a portion of lot 10, in block 8, situate in the city of Prescott and county of Yavapai, more particularly described as that portion of lot 10 lying immediately west of and adjoining that particular brick building situate on lots 9 and 10, in said block 8, and occupied by Bashford & Co. as a store, commencing at a point on the north line of Gurley street, in said city, at the south-west corner of said brick building; thence west, along and with the north line of said Gurley street, six inches, to the south-west corner of said lot 10; thence north, along and with the west line of said lot 10, 125 feet, to the north-west corner of said lot 10; thence east six inches to the north-east corner of said brick building; thence south, along and with the outer edge of the west wall of said brick building, 125 feet, to the place of beginning—the same fronting six inches on said Gurley street, and running back, with a uniform width of six inches, 125 feet, to an alley.

The jury returned the following verdict: "We, the jury, find for plaintiffs, and give them two inches west of the brick wall;" on which verdict the court below entered up a judgment. The trouble with the judgment is that the verdict is too uncertain to justify it. The attempt is made to cure the defect in the verdict by the judgment. The jury might have been requested to retire and put their verdict in proper form, but where a verdict is bad for uncertainty, it cannot be corrected or cured by the judgment.

Since the decision in this case and before writing the opinion, a petition for rehearing was filed, in which it was claimed that, there being no bill of exceptions in the case, the verdict was not before the court. The petition for rehearing was denied. The verdict being copied *verbatim* into the judgment, must be considered before us, the same as if brought up by a bill of exceptions.

Judgment reversed, and new trial ordered.

Howard, C. J., and Fitzgerald, J., concurring.

[Civil No. 142. Filed July 2, 1885.]

[S. C. 7 Pac. 496.]

P. T. DOWLING, Plaintiff and Respondent, v. WM. R. HUNT, Defendant and Appellant.

1. PLEADING—ACTION AGAINST DRAWER ON BANK CHECK—COMPLAINT MUST ALLEGE EITHER DEMAND AND NOTICE OR FACTS EXCUSING FAILURE.—In a complaint against the drawer of a bank check or bill of exchange, so-called, it is necessary to aver either demand and notice to the drawer of non-payment, or such facts as would excuse demand and notice.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Reversed.

The facts are stated in the opinion.

J. A. Anderson, for Appellant.

The complaint does not state facts sufficient to constitute a cause of action. The suit is brought on a bank check given by Hunt to plaintiff Dowling. The complaint alleges presentment and non-payment, but fails to allege notice thereof to Hunt, or excuse for not giving notice.

"Unless the complaint contains facts constituting a cause of action a recovery and judgment cannot be sustained." *Barron* v. *Feink*, 30 Cal. 489; citing: *Bartlett* v. *Crozier*, 17 John. 457, 8 Am. Dec. 428.

"The same rules which are established in relation to the necessity of presentment and notice in order to charge the drawers and endorsers of bills of exchange in general apply as well to checks." Daniel on Negotiable Instruments, Sec. 1586.

"In a complaint against the drawer of a bank check, or a bill of exchange, properly so-called, it is necessary to aver either demand and notice to the drawer of non-payment, or such facts, *e. g.*: want of funds at bank, as excuse, demand and notice." *Shultz* v. *Depuy*, 3 Abb. Pr. 252; *Harker* v. *Anderson*, 21 Wend. 40.

Haynes and Stiles, for Respondent.

PINNEY, J.—This action was brought to recover upon a bank check alleged to have been given by appellant to respondent on the Guaranty Trust Bank of Philadelphia, about the month of March, 1883. The complaint alleges that the check was presented for payment about April 1, 1883, and that payment was refused by the bank. Appellant being a non-resident, and the complaint alleging that he has property in this territory, the action is brought here. There was no appearance in the court below on the part of the defendant. Judgment was taken by default, and the case is brought here upon the judgment roll.

It is complained by counsel for appellant that the complaint fails to state a cause of action, for the reason that the complaint fails to allege notice to the drawer of presentment and non-payment. Under our practice, if the complaint fails to state a cause of action, a recovery and judgment cannot be sustained. The giving of a check on a bank transfers at once the amount of funds called for by the check from the drawer to the drawee, when the drawer has funds at the bank, and if the bank refuses to pay for any cause, the drawer is entitled to notice, so he may inquire into the cause of such refusal.

In a complaint against the drawer of a bank check or bill of exchange, so called, it is necessary to aver either demand, and notice to the drawer of non-payment, or such facts as would excuse demand and notice. *Shultz* v. *Depuy*, 3 Abb. Pr. 252.

We are of the opinion that the complaint fails to allege facts sufficient to constitute a cause of action, and for this reason the judgment will be reversed and cause remanded.

Howard, C. J., and Fitzgerald, J., concur.

[Civil No. 133. Filed August 17, 1885.]

[S. C. 7 Pac. 718.]

THE COPPER QUEEN MINING COMPANY, Appellant, v. THE ARIZONA PRINCE COPPER COMPANY, Respondent.

1. APPEAL AND ERROR—JUDGMENT UPON VERDICT WHERE THERE IS SUBSTANTIAL CONFLICT IN EVIDENCE WILL NOT BE DISTURBED.—A judgment based upon a verdict where there is a substantial conflict in the evidence should not be disturbed by the appellate court.

2. JURY—MISCONDUCT OF—USE OF INTOXICANTS—ACTUAL INTOXICATION DISQUALIFIES—PARTY FURNISHING SAME CANNOT COMPLAIN WHERE ACTUAL INTOXICATION DOES NOT RESULT—VERDICT WILL NOT BE DISTURBED WHERE INTOXICANTS USED HAD NO INFLUENCE ON JURY.—Intoxication will disqualify a juror from the performance of his duty and amounts to misconduct. Where both parties prepared a feast for the jury at which liquors were served neither party can be heard to complain of the act and performance which they jointly inaugurated, without proof of intoxication to the extent of disqualifying the jury, or some members thereof, for a proper discharge of duty. Courts will not disturb a verdict when satisfied that intoxicating liquors had no influence upon the jury.

OPINION ON RE-HEARING—JUDGMENT AFFIRMED.—Post, 169.
DISMISSED ON MOTION—127 U. S. 782; 32 Law Ed. 331.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Cochise. Affirmed.

The facts are stated in the opinion.

Lewis and Dibble, W. H. Stilwell, and John Haynes, for Appellant.

Arizona, like Nevada, has adopted the old practice act of California, which has not been much changed by the Code of Civil Procedure. In such cases it has always been the rule to give great weight to the decisions of the parent State. The rule which has always governed the Supreme Court of California is that if there be a *substantial* conflict in the

evidence the appellate court should not interfere; but if the great preponderance is against the finding or verdict the court should reverse it. *Witherby* v. *Thomas,* 55 Cal. 11; *Livermore* v. *Stine,* 43 Cal. 277; *Clark* v. *His Creditors,* 57 Cal. 639; *Downey* v. *Hellman,* 58 Cal. 63; *Fresno etc.* v. *McCarthy,* 59 Cal. 309.

If the conflict is undoubted and substantial an order overruling a motion for new trial will not be interefered with. *Price* v. *Sturgis,* 44 Cal. 597.

The rulings of district courts denying motions for new trial have repeatedly been reversed and a new trial granted by the Supreme Court when there was some evidence tending to support the verdict, on the ground that it was not supported by the evidence. *Branson* v. *Caruthers,* 49 Cal. 381; *Carpenter* v. *Gardner,* 29 Cal. 161; *Franklin* v. *Dorland,* 28 Cal. 175, 87 Am. Dec. 111; *Guerrero* v. *Ballerino,* 48 Cal. 118.

There is a great conflict of authority as to what misconduct will be sufficient to warrant a court in setting aside a verdict of a jury on the ground of misconduct. In an early day there was some uniformity in the cases, the rule being that any drinking of intoxicating liquor was sufficient to vacate the verdict. *Power* v. *Van Buren,* 7 Cow. 562; *Ryan* v. *Harrow,* 27 Iowa, 494, 1 Am. Rep. 302; *Gregg* v. *McDaniel,* 4 Harr. 367; *Deputy* v. *Betts,* 4 Harr. 352; *Perry* v. *Bailey,* 12 Kan. 539; So in Indiana: *Davis* v. *State,* 35 Ind. 496, 9 Am. Rep. 760; likewise in New Hampshire: *State* v. *Bullard,* 16 N. H. 139; *Leighton* v. *Sargent,* 31 N. H. 119, 64 Am. Dec. 323; so too in Arkansas: *Pelham* v. *Page,* 6 Ark. 535; Hilliard on New Trials, Sec. 199, Sec. 2, A; *People* v. *Gray,* 61 Cal. 183, 44 Am. Rep. 549; *Johnson* v. *Root,* 2 Cliff. 108. Fed. Cas. No. 7409; *Jones* v. *State,* 13 Tex. 182, 62 Am. Dec. 550; *Early* v. *State,* 1 Tex. App. 248, 28 Am. Rep. 413; *State* v. *Bruce,* 48 Iowa, 530, 30 Am. Rep. 403.

Other cases hold that the mere drinking will not vitiate the verdict, but if there is any reason to believe that any juror drank to excess the verdict must fall. *Wilson* v. *Abrahams,* 1 Hill, 207; *Commonwealth* v. *Roby,* 12 Pick. 512-519; *Richardson* v. *Jones,* 1 Nev. 405; Thompson & M. on Juries, 457, § 378.

The quantity of liquor drank ought to satisfy the court that they could not be otherwise than affected by it. Two or three drinks before dinner, eighteen bottles of wine at dinner, and then beer and whiskey in the jury room afterwards, were sufficient to upset the jury.

The plaintiff makes answer that we consented to allow the jury to have wine at their dinner. That is not by any means satisfactorily shown; but, if it were so, it cannot be claimed that we consented that the jury should have drinks before and after dinner, nor that they should drink to excess.

Remarks made by jurors showing prejudice, though of itself perhaps not sufficient to justify setting aside a verdict, are always considered by the courts in determining whether a new trial should be granted. Thompson & M. on juries, 443; 445 (3); 447 (4); 462 (4).

So, too, it has always been held that the separation of a jury under suspicious circumstances vitiates the verdict. *Smith* v. *Thompson,* 1 Cow. 221; *Horton* v. *Horton,* 2 Cow. 589; *Oliver* v. *First Presbyterian Church,* 5 Cow. 283; *Wilson* v. *Abrahams,* 1 Hill, 207; *State* v. *Jones,* 7 Nev. 408; Thompson & M. on Juries, 353, 356, 364, 367 and 380.

Here we have not only shown the separation of the jury, under suspicious circumstances, but several such separations. It is shown that the juror Todman separated twice from his fellows to talk to the man Williams, with whom, a few days later, he left Tombstone, and who afterwards wrote that for a thousand dollars he could furnish evidence that the jury were drunk, and that other irregularities had occurred. This man's letter is among our affidavits, and if the court will read it, it will see what character of men we had to encounter.

Campbell, Williams and Robinson, for Respondent.

HOWARD, C. J.—Action of ejectment for the recovery of mining ground. Judgment in the district court of Cochise county for plaintiff. Motion by defendant for a new trial denied, from which judgment and order denying motion defendant appeals to this court. By stipulation, appearing in the record, the question of location, corporate existence, and claims for damages for value of ore extracted, made by

plaintiff's complaint, and the cross-complaint of defendant, are eliminated from the case, leaving for review, on appeal, the legal right of the parties to the body of ore involved in the issue, and the question presented by the appellant's specification of errors—alleged misconduct of the jury.

Plaintiff, the Arizona Prince Copper Company, and defendant, the Copper Queen Mining Company, own adjoining claims, with a common side line of between 500 and 560 feet. By the allegations of the complaint, and the evidence of plaintiff, the claim is asserted and sought to be established that the apex or outcrop of the vein is on the ground of plaintiff, and that it has the right to follow it beyond and under the side line into the adjoining ground of defendant. The defendant by cross-complaint admits a portion of the outcropping to be on plaintiff's ground, and alleges, and gives evidence tending to establish the fact alleged, that part of the outcropping is on its ground; that the vein at the surface divides, and that one division extends into defendant's ground, the other running into plaintiff's ground. Plaintiff admits that a streak of the ore-bearing rock comes to the surface of defendant's ground, but contends that it is outside of the walls of the vein, and is but a spur of the main vein which outcrops on plaintiff's ground. The plaintiff claims that both walls of the vein are on its ground, and defendant practically concedes that the foot wall is on plaintiff's ground, but denies that the hanging wall is.

The issue made by the pleadings as to the character of the body of ore—whether a lead, load or vein—and other questions of fact, notably the particular location of the apex of the vein with reference to the boundaries of the respective claims, the dip and course of the vein, etc., as well as the question in controversy above referred to, were all questions of fact no more positively asserted and insisted on the one side than denied and controverted by the other, not only by the pleadings, but by the evidence in the case. There is not a material fact involved in the issue joined between the parties which was not on the trial controverted, and that by evidence not only conflicting in its character, but in our opinion bringing the case clearly within the rule of "substantial conflict" in the evidence. The immense volume con-

stituting the record in this case contains over 600 pages of evidence, and we have examined it with a view to ascertain if there was one material fact in controversy in the issue upon which there was not sufficient evidence on either side to clearly warrant the application of the rule of non-interference of the appellate court where there is a substantial conflict in the evidence. If we were to accept the rule insisted upon by appellant, that "if the great preponderance of evidence is against the findings or verdict the court should reverse it," (which we do not accept as a correct rule of action for the appellate court,) we fail to find in the mass of testimony *pro* and *con*, on each of the contested propositions involved in this case, that "great preponderance" which would bring our action within such a rule. Even that rule would not warrant our interference with this judgment. The issues were plainly and squarely presented by the pleadings at the trial, and the too-frequent conflict of "expert testimony" is more apparent than the conflicting testimony of non-professionals on the material facts involved. The case is clearly within the well-established rule that a judgment based upon a verdict where there is a substantial conflict in the evidence should not be disturbed by the appellate court. *Union Pac. Ry. Co.* v. *Diehl*, 33 *Kan.* 422, 6 *Pac.* 566; *Pringle* v. *Spaulding*, 53 *Barb.* 21; *State* v. *Yellow Jacket S. M. Co.*, 5 Nev. 415; *Kimball* v. *Gearhart*, 12 Cal. 48; *Farrell* v. *Enright*, 12 Cal. 452; *Richardson* v. *McNulty*, 24 Cal. 348; *Iburg* v. *Suanet*, 47 Cal. 267; *McMurray* v. *Basnett*, 18 Fla. 609; *Gower* v. *Quinlan*, 40 Mich. 572; *Elliott* v. *Van Buren*, 33 Mich. 49, 20 Am. Rep. 668.

The alleged misconduct of the jury appears by the record to have been carefully and thoroughly investigated by the court below on the motion for a new trial. We concur in the conclusions arrived at by that court. While it is true that the jury "were feasted and wined" at the dinner ordered by the sheriff, by the agreement of both plaintiff and defendant, (a proceeding which the officer in charge of the jury ought not to have permitted, even by consent of both parties,) we are yet unable, after reading the many affidavits bearing upon the question of the alleged intoxication of members of the jury, to come to the conclusion that any of them indulged

in liquors to the extent of intoxication, or that, by reason of the eating and drinking by the jury, at the joint expense of the parties, the jury, or any member thereof, was unfitted for the intelligent, fair, and impartial performance of duty. That intoxication would disqualify a juror from the performance of his duty, and amount to misconduct, there can be no question; and while it is true that there is some evidence from which the fact of the use of liquor by the jury other than that drank at the supper table may be legitimately inferred, much of the showing to impeach the verdict was speculative, and of a character not commending itself to our confidence. We cannot find from the evidence that any juror was intoxicated, or under the influence of liquor. The plaintiff and defendant prepared the feast and inaugurated the festivities. Neither can be heard to complain of the act and performance which they jointly inaugurated, without proof of intoxication to the extent of disqualifying the jury, or some members thereof, for a proper discharge of duty. The rule is well established that courts will not disturb a verdict when satisfied that intoxicating liquors had no influence upon the jury, and we are satisfied on that point in this case. *Jones* v. *People,* 6 Colo. 452, 45 Am. Rep. 526; *State* v. *Jones,* 7 Nev. 408; *Richardson* v. *Jones,* 1 Nev. 406; *Kee* v. *State,* 28 Ark. 165; *State* v. *West,* 69 Mo. 401. 33 Am. Rep. 506; *State* v. *Sparrow,* 3 Murph. 487; *Pittsburg, etc., Ry. Co.* v. *Porter,* 32 Ohio St. 333; *People* v. *Lyle,* Cal. 4 Pac. 977; *May* v. *People,* 8 Colo. 210, 6 Pac. 816.

The charge of the court, including the instructions asked and given, taken as a whole, gave the law fairly and correctly to the jury. We find no valid ground for a reversal. The judgment and order of the court below denying the motion for a new trial are affirmed.

Fitzgerald, J., concuring.

Pinney, J., having tried this case in the court below, took no part in the decision.

[Civil No. 135. Filed September 3, 1885.]

[S. C. sub. nom. *Cullum* v. *Paul*, 8 Pac. 187.]

R. H. PAUL, Defendant and Appellant, v. H. B. CULLUM, Plaintiff and Respondent.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—EVIDENCE OF TITLE AS ASSIGNEE ADMISSIBLE THOUGH SUING IN PERSONAL CAPACITY—PARTIES—ASSIGNEE MAY SUE EITHER IN PERSONAL OR REPRESENTATIVE CAPACITY TO RECOVER PROPERTY REDUCED TO POSSESSION FROM THIRD PARTY WRONGFULLY DEPRIVING HIM OF SAME.—Certain evidence of title in plaintiff as assignee held admissible in action of replevin though plaintiff sued simply in his individual capacity. Where an assignee has taken possession of the personal property conveyed to him by a deed of assignment, and has been wrongfully deprived thereof by a third party, he may sue for its recovery either in his personal or representative capacity.

2. SAME—PRESUMPTIONS—WITHOUT PROOF OF CREDITORS DISSENT THEIR ASSENT PRESUMED.—In the case of a general voluntary assignment for the benefit of creditors without preference, and without restrictions, in the absence of proof of dissent, the law presumes the assent of the creditors to the assignment.

3. APPEAL AND ERROR—NECESSITY FOR MOTION FOR NEW TRIAL—FINDINGS WILL NOT BE REVIEWED WITHOUT—FINDINGS ON SAME FOOTING AS VERDICT OF JURY—PRACTICE TO OBTAIN REVIEW OF QUESTION OF WANT OR INSUFFICIENCY OF EVIDENCE TO SUPPORT JUDGMENT.—The findings of the court below will not be reviewed on appeal unless there is a motion for a new trial. *Federico* v. *Hancock*, 1 Ariz. 512, 25 Pac. 650, cited and approved. Findings by the court stand on the same footing as the verdict of the jury. When a party complains that the evidence was insufficient to justify a verdict or decision the appropriate remedy is by motion for a new trial. If the verdict or written findings support the judgment so long as they remain undisturbed the judgment cannot be assailed on the ground that it is not justified by the evidence. Before the judgment can be attacked on this ground the verdict or finding must be set aside because not justified by the evidence and this can only be done on motion for new trial. In the absence of motion for a new trial findings are conclusive and binding on this court.

4. SAME—FINDINGS—WHERE ATTACKED FOR WANT OF EVIDENCE RECORD MUST PURPORT TO CONTAIN ALL THE EVIDENCE.—When the statement on appeal does not purport to contain all the evidence an

appellate court will not consider an objection that the findings are not supported by the evidence.

5. SAME—JUDGMENT—CLERICAL ERROR NOT PREJUDICIAL TO APPELLANT, —Where the judgment shows a clerical mistake not prejudical to appellant judgment will be affirmed.

REHEARING DENIED July 9, 1886.

AFFIRMED.—132 U. S. 539, 10 Sup. Ct. Rep. 151, 33 Law Ed. 430.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Affirmed.

The facts are stated in the opinion.

Ben Morgan, for Appellant.

So absolutely unwarranted by the evidence are the findings of fact that a brief statement is all we deem to be necessary in order to insure a reversal of the judgment.

The court finds as material facts upon which its judgment rests that the assignment made by Lord and Williams Company was executed in the firm name by W. W. Williams, when the instrument shows it was executed on behalf of that firm by C. E. Harlow; that Lord & Williams, on the 25th day of October, 1881, made an assignment of all their property to the plaintiff, H. B. Cullum, when no evidence was offered to establish such fact, and plaintiff's counsel expressly disclaimed title to the property from any such source. That Cullum was the owner of the property attached on the day the attachment was levied, in the face of the testimony that at that time it was not the property of his assignors but the defendant's in the suit of *Thompson* v. *Lord & Williams*.

Cullum was not a purchaser for value, and all defects in his grantor's title could be urged against his. If they could not defend as bona fide purchasers for value plaintiff must fail.

In order to render judgment for the plaintiff the court was forced to find that the taking in of Harlow as a partner *ipso facto* dissolved the old firm of Lord & Williams in the

face of the fact that *ex industria* that firm was preserved. As a legal conclusion in the face of the testimony the court adjudged that without a sale the property of Lord & Williams by the agreement with Harlow for a definite time, to perform specific services, to be compensated by a definite and fixed sum, gave him such an interest in their property as would defeat the claim of their creditors.

Harlow was by the terms of the written agreement between Lord & Williams and himself to contribute nothing in the way of merchandise or money. He paid not one dollar. Lord & Williams Company paid nothing to Lord & Williams —no price was even fixed. He was to take charge of and superintend the sale of Lord & Williams' goods. They were turned over to and received by him *as such*, and were in this condition when they were seized on attachment by defendant in the suit of a creditor of Lord & Williams on an indebtedness against that firm. True, Harlow was to receive for his services a specific portion of the profits, but the contract and oral testimony absolutely negative the idea that he was a co-owner in the goods.

We contend that Harlow and not Williams made the assignment for Lord & Williams Company, and that as against Lord & Williams he conveyed nothing. We contend that there was no evidence of any creditor of either firm save Thompson, plaintiff in the suit against Lord & Williams.

Earll & Campbell, for Respondent.

The appellant appears to rely exclusively upon the ground of the insufficiency of the evidence to justify the findings of the court. But he cannot be heard in this respect for he made no motion for a new trial and in the absence of such a motion this court will not consider that question. *Gagleardo* v. *Hobulin*, 18 Cal. 394; *Carpenter* v. *Williamson et al.*, 25 Cal. 154; *Ellis* v. *Jeans*, 26 Cal. 275; *Carpenter* v. *Gardiner*, 29 Cal. 160; *Hihn* v. *Peck*, 30 Cal. 280.

On an appeal from the judgment the appellate court cannot consider the question whether the findings of fact are justified by the evidence. *People* v. *Banvard*, 27 Cal. 474; *Racouillat* v. *Rene*, 32 Cal. 450.

An appellant will not be permitted to allege that the evidence did not justify the judgment except on an appeal from an order denying a motion for a new trial. *Reed* v. *Bernal et al.*, 40 Cal. 628; *Rycraft* v. *Rycraft*, 42 Cal. 444; *City of Stockton* v. *Creanor*, 45 Cal. 247; *Cooper* v. *Pacific Mutual Life Ins. Co.*, 7 Nev. 116, 8 Am. Rep. 705.

Moreover if it does not appear that the statement contains all the evidence in the case in support of the judgment, the court will presume that other evidence was given in support thereof.

It is true that there is an immaterial error in the first finding in stating that the firm name of Lord & Williams Company was signed by W. W. Williams instead of being signed by C. E. Harlow, but that is of no consequence because either member of the firm could lawfully sign the firm name.

It is true that the plaintiff disclaimed title to the property from the Lord & Williams assignment and claimed it from the assignment of Lord & Williams Company. There was no defect in the title of Lord & Williams Company to the property, and Cullum, upon receiving the assignment from that company and taking possession of their property under the assignment, became the legal owner thereof in trust for their creditors.

The court did not find that the taking in of Harlow as a partner, *ipso facto*, dissolved the old firm of Lord & Williams in the face of the fact that *ex industria* that firm was preserved. Nor did the court find in the face of the testimony. The facts were established that prior to the 1st day of March, 1881, the firm of Lord & Williams was engaged in several branches of business at Tucson, viz: banking business, Indian contracts and general merchandising. That finding the difficulty of carrying on all these branches, they agreed to form a co-partnership in the mercantile business exclusively with C. E. Harlow upon the terms mentioned in their agreement, continuing the other branches of their business as before. That immediately notice was given of the formation of the new co-partnership. That Harlow took immediate charge of the mercantile business and that up to the time of the failure of the new firm carried on its business as a new concern and made its purchases and sales as such. That books

were opened by the firm of Lord & Williams Company in which it was charged with the stock of Lord & Williams then on hand, and the latter firm credited with the value thereof.

It is not necessary on the formation of a partnership that a partner should contribute any funds. It is enough if he contributes his skill and labor, of the value of which the other partners are to judge. That he shares in the profits and losses, and is liable to account at the close of the partnership. That he becomes liable for all the purchases made for the firm, and is in every respect recognized as a member thereof.

"Where one person advances funds for carrying on trade, and another gives his personal services for which he is to receive a portion of the profits, there is a partnership existing between them, both as between themselves and as regards third persons." *Dob* v. *Halsey*, 16 John. 34; Col. on Part. § 38, and authorities there cited.

By virtue of the agreement entered into between Lord & Williams and C. E. Harlow, March 1, 1881, Harlow became liable for all the purchases made for the firm and was in every respect recognized as a member of the firm.

It is true that counsel claimed that the assignment was executed by a member of the firm and the court so found. He did so on proof of the execution of the assignment, the possession of the plaintiff under it, and the evidence of the insolvency of Lord & Williams Company. It found that the merchandise of Lord & Williams was transferred to the firm of Lord & Williams Company, and the evidence justified the court in so finding. As a necessary corollary it found that the property so assigned became the property of Cullum as trustee for the creditors of that firm.

It vested the legal title to the property in him, and the court decided that a creditor of Lord & Williams could not under the evidence in the cause attach the property of Cullum as security for his debt against Lord & Williams.

Cullum being the legal owner and possessor at the time of the seizure by defendant had a right to bring this suit in his own name without describing himself as assignee of Lord & Williams Company. *Butterfield* v. *Macomber*, 22 How. Pr. 150

With respect to the power of each partner to make an assignment for the benefit of all the creditors of the firm we refer to the following authorities: 3 Kent's Com., 10th Ed., p. 50, note b; *Harrison* v. *Sterry*, 5 Cranch. 289 (Curtis Ed., 267); Burrill on Assignments, §§ 86 and 87, and authorities there cited.

HOWARD, C. J.—This is an action brought by plaintiff to recover from the defendant the possession of certain goods, wares, and merchandise alleged to have been wrongfully taken by defendant from plaintiff, or for the sum of $35,000, the alleged value thereof, in case delivery cannot be had. The answer contains denials of the allegations of the complaint, and a further and separate answer and defense, alleging that defendant, as sheriff of Pina county, had seized and taken possession of the goods, etc., under an attachment issued from the district court of Pima county in the case of *G. Howard Thompson* v. *Lord & Williams*, further alleging that goods, etc., were, at the time of seizure, in possession of and the property of Lord & Williams. The case was tried by the court without a jury.

The court found substantially that on the twenty-fifth day of October, 1881, the goods, etc., in question were the property of the firm of Lord & Williams Company, composed of C. H. Lord, W. W. Williams, and C. E. Harlow, and that on that day said firm made a general assignment of all their property not exempt from execution to plaintiff, for the equal benefit of all their creditors, and plaintiff accepted said assignment and received said goods, etc., from said firm, and took possession thereof, and that said assignment was made in good faith; that defendant, as sheriff of Pima county, on the twenty-eighth day of October, 1881, seized and took said goods, etc., from the possession of plaintiff under an attachment that day issued from the district court of Pima county in the case of *G. Howard Thompson* v. *Lord & Williams*; that said property, when so seized and attached, was the property of plaintiff, and not subject to such seizure or attachment, and that the value thereof was $35,000.

The court found, as conclusions of law, substantially that the said goods, etc., were wrongfully taken and detained by

the defendant from the possession of plaintiff, and that plaintiff was entitled to a judgment for the return of said property, and if the same cannot be made, for the sum of $35,000 against defendant. A judgment was entered upon their finding in the following words:

"The court having this day signed and filed its findings of fact and conclusions of law in this case, and the value of the property claimed having been found by the court to be the sum of thirty-nine thousand dollars, and the property claimed having been taken into possession of the plaintiff, therefore it is adjudged that the plaintiff have and retain possession of the personal property described in the complaint with the costs," etc.

The case is brought up on appeal from the judgment alone. There was no statement on motion for a new trial. The record contains the judgment roll, a statement on appeal signed by attorneys for plaintiff and defendant, and defendant's specification of errors. The statement on appeal sets out evidence given at the trial without purporting to contain all the evidence given at the trial. We will now proceed to notice defendant's specification of errors:

1. "The court erred in refusing to sustain the objection made by defendant to the introduction of the power of attorney offered by the plaintiff." There is nothing in the record showing this to have been error. The power of attorney was duly authenticated and was pertinent, and was part of plaintiff's evidence of title.

2. "The court erred in permitting the articles of agreement of the partnership between Lord & Williams Company to be read in evidence against defendant's objection." The record shows no error in this. The agreement was a part of plaintiff's evidence of title, and was duly proved.

3. "The court erred in admitting in evidence the assignment made by Lord & Williams Company to plaintiff Cullum against defendant's objection." The record shows no error in this. The assignment was a part of plaintiff's evidence of title, and was duly proved.

4. "The court erred in refusing to grant the motion made by defendant to strike out the testimony introduced by plaintiff in the case on the ground of variance between it and the allegations of the complaint."

5. "The court erred in refusing to pass upon and grant defendant's motion for a nonsuit made on the conclusion of plaintiff's case, on the ground that the plaintiff had failed to make out his cause of action as alleged in his complaint." The record shows that these two specifications of error, as well as the first three, were based on an assumption by defendant that because plaintiff in his complaint had sued simply in his individual capacity, without showing his character as assignee, that therefore he should not be permitted to give in evidence the several instruments going to show title invested in him as assignee. The question raisd is whether this assignee, after he had taken possession of the personal property conveyed to him by the deed of assignment, and has been wrongfully deprived thereof by a third party, can sue in his personal capacity to recover possession of the property, or whether he is bound to sue in his representative capacity. The authorities leave no doubt on this question. It is expressly held in *Hogland* v. *Trask,* 48 N. Y. 686, and *Ogden* v. *Prentice,* 33 Barb. 160, that an assignee may sue either in his personal or representative capacity. It is a familiar rule that an executor or administrator, after he has reduced the goods of the estate to his possession, and has then been wrongfully deprived of them, may sue for the recovery thereof in his individual capacity. It is clear that the record shows no such errors as are claimed in fourth and fifth specifications of error.

6. "The defendant assigns as further ground of error the insufficiency of said findings to warrant or support the judgment in favor of plaintiff, on the ground that said findings show that the plaintiff H. B. Cullum, he'd said property by virtue of the assignment of Lord & Williams Company, and as trustee for the purpose of paying the creditors of said firm; that at the time of the levying of the attachment in the case of *Thompson* v. *Lord & Williams* by the defendant herein, by virtue of which he took possession of said goods, etc., no creditor of said firm had assented to said assignment or become a party thereto in any way." It is a sufficient answer to this specification of error to say that the findings *nowhere show* that at the time of the levy of the attachment "no creditor of the firm had assented to said assignment or

become a party thereto in any way." We will add, however, that in the case of a general voluntary assignment for the benefit of creditors without preference, and without restrictions, as the record shows this to have been, in the absence of proof of dissent, the law presumes the assent of the creditors to the assignment for their benefit. *Grover* v. *Wakeman,* 1 Amer. Lead. Cas. 72; *Nicoll* v. *Munford,* 4 Johns. Ch. 523, 529.

7. Also that there is no evidence that at the time of making of the said assignment there were any creditors of Lord & Williams Company, for whose benefit said assignment was made, and said Cullum claimed to hold said property. If this specification means that the findings show there was "no evidence," (and to entitle it to the consideration of this court it must mean that,) then a sufficient answer to it is that the findings show no such thing; but, on the contrary, it is shown by the first finding that at the time of making the assignment the firm of Lord & Williams Company were *insolvent,* a condition that presupposes creditors.

8. The specification of errors then proceeds as follows: "The defendant further shows the insufficiency of the evidence to justify the findings of facts and conclusions of law, upon the following grounds," and then elaborately sets out 15 distinct grounds. This specification and the grounds therefor cannot be considered by this court.

9. The record shows no statement on motion for new trial, and no motion for new trial. This is an attempt to review the findings of the court without a motion for a new trial. The findings of the court below will not be reviewed on appeal unless there was a motion for new trial. *Federico* v. *Hancock,* 1 Ariz. 512, 25 Pac. 650. In *Gagliardo* v. *Hoberlin,* 18 Cal. 395, the defendant *brought up all* the evidence, but made no motion for a new trial. The court say:

"In this case, no motion having been made for a new trial, the findings of the court are conclusive as to facts."

Mr. Justice Field, in *Duff* v. *Fisher,* 15 Cal. 380, says:

"In this state the statute provides the manner in which the verdict of a jury, upon an issue submitted to its decision, may be reviewed. It is only by a *motion for a new trial.*"

The statutes of California and Arizona are identical on

this subject, and findings by the court stand on the same footing as the verdict of the jury. Though this doctrine is firmly established by an unbroken line of decisions in California construing a statute identical with our own, yet the whole doctrine is so ably and fully set forth by the Supreme court of California in *Reed* v. *Bernal*, 40 Cal. 628, that we will quote at length from that decision. The court says, page 630 *et seq.*:

"When a party complains that the evidence was insufficient to justify a verdict or decision, the appropriate remedy is by motion for a new trial, and in pursuing this remedy the statute requires him to specify in his *statement in support* of the motion the particulars in which the *evidence* was insufficient. In this method the attention of the court and counsel is particularly *directed* to the precise point in which the evidence is alleged to be insufficient, so that on the *trial of the motion* the court may review the evidence and exercise its judgment and discretion, either by upholding or setting aside the verdict or decision. It is conceded on all sides that if there be any evidence whatever tending to support the verdict or decision, its sufficiency can only be determined, and the evidence reviewed for that purpose, on a motion for new trial, and we have repeatedly held that if there be a substantial conflict in the evidence, this court will not disturb the verdict or findings. It is equally well settled that if there be no findings in a case tried by the court without a jury, and no proper exceptions for want of findings, a presumption arises that the court found all the facts necessary to support the judgment. If there be no actual findings, the law implies findings sufficient to sustain the judgment. In all cases, therefore, whether there be a verdict or written findings or only the findings which the law implies in support of the judgment, if it be claimed that there was no evidence whatever to support the judgment, this is only another mode of saying that the evidence was insufficient to justify the verdict or findings, as the case may be. If the verdict or written findings support the judgment, it is too plain to admit of discussion that, so long as the verdict or writen findings remain undisturbed the judgment cannot be assailed on the ground that it is not justified by the evidence. Before the judgment

can be attacked on this ground the verdict or findings must be set aside because not justified by the evidence, and this can only be done on motion for a new trial."

Such is the law of California and Arizona, and it is decisive of this case. The findings of the court in this case clearly warrant and support the judgment, and in the absence of a motion for a new trial these findings are conclusive and binding upon this court.

There is another serious obstacle in the way of defendant in his attack upon the findings of fact and conclusions of law. It is that the statement on appeal does not purport to contain all the evidence, and in examining the whole record it is evident that it does not. When the statement on appeal does not purport to contain all the evidence, the appellate court will not consider an objection that the verdict is not sustained by the evidence. *Moore* v. *Tice*, 22 Cal. 514. It will be seen by the judgment copied into this opinion that in its recital it states that it was found by the court the value of the property was $39,000, whereas the findings show that the value was $35,000. This is evidently a clerical mistake in the party who draughted the judgment. The judgment shows that the property was in the possession of the plaintiff, and this error in the recital of the judgment can be of no possible damage to defendant. If any one could be damaged by this error, it would be the plaintiff, as the judgment shows that he is in possession of the property, and he and his sureties are responsible for its value.

The judgment of the court below for $35,000, costs, etc., is affirmed.

Pinney, J., concurring.

Fitzgerald, J., having presided at trial in court below, took no part in this case on appeal.

[Civil No. 134. Filed September 14, 1885.]

[S. C. 8 Pac. 160.]

ANSON H. SMITH et al., Plaintiffs and Appellants, v. THE COUNTY OF MOHAVE, Defendant and Respondent.

1. COUNTIES—PLEADING—ALLEGATIONS IN ACTION OF ASSUMSIT—JURISDICTION OF DISTRICT COURT—ACTION ON ACCOUNT LIES AGAINST COUNTIES.—Where complaint after setting forth the contract as executed, alleges full performance by plaintiffs, and presentation to and rejection of their demand by the board of supervisors of a county such complaint is not subject to demurrer for want of jurisdiction of district court, under act of February 12, 1881. The right to sue a county remains unimpaired and extends to every case of account after presentation to and rejection by the board of supervisors.

2. STATUTES CONSTRUED—Act of February 12, 1881—Section 3 of chapter 2, Comp. Laws of 1877.—By the act of February 12, 1881, the legislature intended simply to prescribe the manner of presenting claims against counties, and to define the duties of the board of supervisors in passing on same, and it in no way modifies or affects section 3 of chapter 2 of the Compiled Laws, authorizing counties to sue and be sued.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Mohave. Reversed.

The facts are stated in the opinion.

Samuel Hamilton, E. M. Sanford, and John M. Murphy, for Appellants.

Wm. G. Blakely, District Attorney, A. E. Davis, and Clark Churchill, Attorney General, for Respondent.

FITZGERALD, J.—This was an action brought by plaintiffs against the county of Mohave on a contract by which the plaintiffs agreed to do the county printing at a fixed compensation to be paid for by the defendant. The complaint, after

setting forth the contract as executed, alleges full performance of its terms and conditions by plaintiffs, and presentation to and rejection of their demand by the board of supervisors of said county. Defendant demurred to the complaint, which was sustained by the court below, and the propriety of the action, in that respect, is brought in question by this appeal.

The sole question presented at the hearing of the demurrer in the court below, and the only one urged here, is whether the district court of Mohave county has jurisdiction to determine the merits of a claim against a county by original proceedings in the nature of *assumpsit* commenced in that court, when such claim has been presented to and rejected in whole or in part by the board of supervisors.

It is contended in support of the demurrer that the act of February 12, 1881, expressly withdraws questions of this character from the courts, and confers exclusive jurisdiction upon the board of supervisors. The language of the act shows, we think, conclusively that the legislature intended simply to prescribe the manner of presenting claims against counties, and to define the duties of the board of supervisors in passing on the same, and that it in no way modifies or affects section 3 of chapter 2 of the Compiled Laws, authorizing counties to sue and be sued. The right to sue a county remains unimpaired, and extends to every case of account *after presentation to and rejection by the board of supervisors.*

Judgment and order reversed, and cause remanded, with directions to the court below to overrule the demurrer.

Howard, C. J., and Pinney, J., concur.

[Crim. Nos. 33, 34, 35. Filed October 16, 1885.]

[S. C. 8 Pac. 295.]

THE UNITED STATES OF AMERICA, Plaintiff and Respondent, v. AMMON M. TENNEY, Defendant and Appellant.
SAME v. PETER J. CHRISTOFFERSON.
SAME v. I. C. KEMP.

1. CRIMINAL LAW—INDICTMENT UNDER EDMUNDS ACT—POLYGAMY—ALLEGATION OF COHABITATION IN SAME COUNT FOLLOWING CHARGE OF OFFENSE OF POLYGAMY HARMLESS SURPLUSAGE.—Objectionable words, referring only to cohabitation after a proper allegation of a polygamous marriage, in a count of an indictment under the Edmunds Act, are harmless surplusage, and do not vitiate the indictment.

2. SAME—EVIDENCE—GENERAL REPUTATION AS CORROBORATIVE EVIDENCE IN PROOF OF MARRIAGE—IN ABSENCE OF FEDERAL STATUTE TERRITORIAL LAW GOVERNS RULE OF PROOF—SECTION 123, C. 10, COMP. LAWS 1871.—Evidence of general reputation as to the relation of husband and wife admissable as corroborative proof of marriage under territorial statute, *supra*, which in absence of congressional enactment governs rule of proof in criminal cases of this character.

3. SAME—SAME—APPEAL AND ERROR—WHERE PARTY OPENS DOOR TO EVIDENCE NOT STRICTLY ADMISSABLE HE WILL NOT BE HEARD TO COMPLAIN ON APPEAL THAT HIS OPPONENT WAS PERMITTED TO FOLLOW.—Where the record shows that evidence as to facts occuring without the jurisdiction of the court and prior to the finding of the indictment was introduced by the defense the trial court is justified in allowing the prosecution to follow. The defense having opened the door it will not be heard to complain.

4. SAME.—SAME—CENSUS RETURN PROPERLY FILED EVIDENCE OF ITS CONTENTS—WITNESS REFRESHING RECOLLECTION—PRACTICE IN PROOF OF FACTS SHOWN BY CENSUS RETURNS.—Census return filed in the office of the secretary of the territory is by statute made an "official document," and evidence of its contents. A census enumerator may use his official returns to refresh his memory. The independent recollection of a census enumerator as to facts stated in his official returns and the official and authenticated returns correct method of proving facts shown by returns.

5. APPEAL AND ERROR—INSTRUCTIONS—CHARGE TO JURY TO BE

CONSIDERED AS A WHOLE.—In the review of a charge to the jury the whole and entire charge should be considered together.

6. PRACTICE—TRIAL OF CAUSES UNDER FEDERAL STATUTES—IN ABSENCE OF CONGRESSIONAL ENACTMENT AS TO MATTERS OF PRACTICE LOCAL STATUTES PREVAIL.—Where in matters of practice the statutes of the United States are silent, in the territory or state where United States courts are held for the trial of causes under the United States laws, the local statutes may be invoked for the purpose of interpreting the law governing the practice and conducting the proceedings of the court.

7. STATUTES CITED—§ 123, COMP. LAWS ARIZ. 1877, COMP. LAWS, § 21, p. 397; COMP. LAWS, § 7, p. 571; PAR. 1891, COMP. LAWS.

8. CRIMINAL LAW—PROSECUTION UNDER "EDMUNDS ACT"—INSTRUCTIONS AS TO CONSTITUENT ELEMENTS OF MARRIAGE CONTRACT AND METHOD OF PROOF—REFERENCE TO TERRITORIAL STATUTES PROPER IN INSTRUCTIONS WHEN TAKEN IN CONNECTION WITH OTHER PORTIONS OF CHARGE.—Where in prosecution under the "Edmunds Act," the court in instructing the jury as to the constituent elements of the marriage contract and the manner of the proof of polygamous marriages read par. 1891, and portion of § 123, c. 10, Comp. Laws, defining marriage and the manner of proof of polygamous marriages, which statutes correctly embodied the essential points which would have been the law even in their absence, a reference to them is unobjectionable, when taken in connection with the other portions of the charge by which the jury were distinctly instructed that they must be satisfied that the first marriage existed and that the second marriage was contracted within the territory, within the time fixed by the United States Statute defining and punishing polygamy.

9. CRIMINAL LAW—PINNEY, J., CONCURRING SPECIALLY—EVIDENCE—ADMISSIONS OF DEFENDANT THAT WOMAN HE LIVES WITH IS HIS WIFE PRIMA FACIE EVIDENCE OF MARRIAGE CONTRACT.—Where a man deliberately admits that the woman he lives with is his wife such admission is prima facie evidence that there has been a marriage contract between the parties.

OPINION ON RE-HEARING, post, 127.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. Affirmed.

The facts are stated in the opinion.

John A. Rush, and J. C. Herndon, (Thos. Fitch, of counsel,) for Appellants.

The demurrer to the first count should have been sustained. One of the grounds upon which the demurrer to that count was based, was that the facts stated and set forth in said count constituted two distinct and separate offenses, one a felony and the other a misdemeanor. In other words, the said count charges that the defendant being a married man, and while his wife was living, he not having been divorced from her, unlawfully married another woman. It seems to us that these facts under the first section of the act of Congress commonly known as the "Edmunds Bill" clearly constituted the act of polygamy, which is punished as a felony. The same count then proceeds to state and charge that the defendant then and there unlawfully and feloniously cohabited with two women, which last fact so charged is made an offense by the third section of said "Act of Congress" and is punishable as a misdemeanor; the said count after thus stating the fact of marriage and the fact of unlawful cohabitation, then concludes by reason thereof, the defendant is guilty of polygamy. Now we ask by reason of what, is it, that he is guilty of polygamy? Is it by unlawful marriage, or by unlawful cohabitation, or both? We submit that an indictment in charging an offense must be certain to a certain intent, that nothing must be left to intendment or deduction. We submit that where facts are stated constituting an offense under one section and additional facts constituting another offense under a different section, the added facts cannot be treated as surplusage. See Section 265, pp. 129, 130, of Comp. Laws. As to certainty required, see Secs. 214, 215, p. 124, Comp. Laws.

The court erred in permitting Juan Sepulveda to testify to the facts occurring without the jurisdiction of the court and more than three years before the finding and presentation of the indictment. The fact that the defendant lived with, held out and introduced these women as his wives in Utah six or seven years ago, in our judgment could not in any way even tend to prove a marriage within this territory after the passage of the act creating the offense. We submit

that Congress at the time of the passage of the law creating the offense, is presumed to have known the common law rules of evidence necessary to prove the offense according to the common law, and having failed to provide, in the Act creating the offense, as to the rules governing the testimony, or the character of the evidence necessary to prove the offense, it is but a reasonable presumption that congress intended that the offense should be proved by the general rules of evidence, according to the common law, except so far as limited by the United States statutes. We maintain that no local law can be invoked to interpret the offense, or prescribe the character of evidence by which the offense might be proved. The court erred in charging that "when such second marriage shall have taken place without the territory, cohabitation in this territory after such second marriage shall be deemed the commission of the crime of bigamy." That is the definition of bigamy under the territorial statute, and this is a prosecution under the U. S. statute which is entirely different. If the court was correct in its charge then a man may be prosecuted twice and twice punished for the same offense. The marriage in Utah would be one offense and the cohabitation in this territory another, both under the same statute, and conviction under one set of facts in Utah would be no bar to a conviction in Arizona under the other facts, or *vice versa*. Such was certainly not the intent of the law creating the offense.

Is polygamy a continuing offense? Does the statute of limitations never run against this crime? When is the crime of polygamy complete? Is it at the time the marriage contract is entered into? If so, then from that moment the statute begins to run. When does a man marry a woman, and how often does he marry the same woman? Does he marry her every time he crosses the boundary line of a State or Territory, taking her with him and calling her his wife? Does he marry every day that he lives and cohabits with her as his wife? Is the marriage contract renewed at the birth of each child, or upon each occasion when a man holds out his wife to the world as his wife and introduces her as such? If the defendant married two women in the Territory of Utah ten years ago, does the fact that he afterwards came

to this Territory with the same women, and when here recognized and introduced and acknowledged them as his wives, constitute marriage in this Territory as contemplated by the act of Congress, under which the indictment was found? It strikes us that the act of Congress was framed to meet a case of this very kind. Why was unlawful cohabitation made a crime in the act of Congress? Simply to meet the case of a man who had unlawfully married two or more women years prior to the passage of the act, and against which the statute of limitations had run. By the third section of the act he could be punished for continuing to live and cohabit with the polygamous or bigamous wife after the passage of the law, but could not be punished for unlawful marriage, on account of the statute of limitations. The gist of the crime of polygamy is *marrying*, not *cohabiting* with her. And while it is true that consent is necessary to the marriage contract yet after the contract is made and entered into and the parties consent to live together as man and wife, such consent after marriage is not a renewal of the contract of marriage. The law of Arizona, the local staute of bigamy as given by the court in the charge to the jury, does not only make the second marriage criminal, but also makes the cohabitation after marriage part of the crime of bigamy, or in certain cases the very crime of bigamy. The law of the United States does not do this, but alone makes the marrying the crime. It also makes cohabitation after such marriage a distinct offense; one of a different grade and character. This distinction is made clear by many decisions. *Brewster* v. *State*, 59 Ala. 101-2; *People* v. *Mosher*, 2 Parker Crim. Rep. 195; *Yarnall* v. *St. Louis etc. Ry. Co.*, 75 Mo. 575; *State* v. *Barnett*, 83 N. C. 615; *State* v. *Sloan*, 55 Iowa, 217, 7 N. W. 516.

In Arizona and in Iowa, and perhaps some other states, the statutes defining bigamy make *unlawful cohabitation with an unlawful or bigamous or polygamous wife the crime* of bigamy itself. They make cohabitation the offense, but Congress makes the marrying a crime and the cohabitation a misdemeanor and not the crime of polygamy or any part thereof. Had the indictment been under the Arizona statute the charge would have been apt, but under the U. S. statute

it was fatally erroneous. Marriage is a civil contract, and the *contract* is complete when a man and woman consent to become, and do become, man and wife. The essence of the contract, as of all contracts, is the consent of the parties, and its validity does not depend upon any form of celebration, or *upon* the cohabitation. *Hayes* v. *People,* 25 N. Y. 397, 82 Am. Dec. 364; Swinburne on Espousals, Sec. 4.

We admit that the contract of marriage is continuing so far as the obligations and responsibilities of the parties are concerned, as in any other contract, but that it becomes a new contract, a new marriage, each succeeding day the parties consent to and carry out the obligations and relations imposed by the original contract we cannot agree.

It is true, in our judgment, that the statute is sufficiently broad to reach cohabitation with two women without marriage, but we do not think it will be doubted that the main, if not the sole purpose of the third section of the act was to punish cohabitation, the result of polygamous marriages.

J. A. Zabriskie, U. S. Dist. Atty., Ed. W. Wells, Asst. U. S. Dist. Atty., for Respondent.

The existence of marriage may be shown by evidence of facts from which it may be inferred. *United States* v. *Miles,* 2 Utah, 25; *Miles* v. *United States,* 103 U. S. 311; Bishop, Statutory Crimes, Sec. 609; 1 Bishop, Marriage and Divorce, Secs. 229, 266, 247, 432, 226; *Camden* v. *Belgrade,* 75 Me. 126, 46 Am. Rep. 364. Of these reputation is one of the facts and competent, and with the other combining elements sufficient. 1 Bishop, Mar. & Div. Secs. 438, 439; 2 Greenleaf, Sec. 461 and notes; *Id.* 462 and notes. Deliberate admissions and confessions, competent to prove marriage. 2 Greenleaf, Sec. 204; *Miles* v. *United States,* 2 Utah, 25; *United States* v. *Miles,* 103 U. S. 311.

In the proof of the second marriage, the same kind of evidence is admissible as in proof of the first. 3 Greenleaf, Sec. 205.

The fact as to whether the defendant was married in Utah or not, has no relevancy to the subject, and can in no wise affect the question of his guilt or innocence. The doctrine

of *lex loci contractus* in regard to marriages, is not applicable in cases of polygamy. 1 Bishop, Mar. and Div. 511, 505-a, 507-b; Story on Conflict of Laws, 143 *et seq.*

And if the defendant was living in the commission of crime, as he was under the Act of Congress of 1862, and an impediment arose, as for instance the statute of limitations, and on coming into this Territory he continued the same criminal relations, the moment the impediment was removed, the criminal liability arose anew, and he became indictable therefor.

When the second marriage shall have taken place outside of this Territory, proof of cohabitation within this Territory, after the second marriage is proved, is proof of the offense of bigamy and polygamy. Sec. 123, Comp. Laws. The procedure and practice in the trials of cases in the District Courts of the Territory, arising under the laws of the U. S., are the same as those in violation of the Territorial statutes, and the rules of practice in the Territory are applicable, and govern the trials of cases arising under the laws of Congress, where those rules do not conflict with the Constitution and the Laws of the United States, and where the U. S. statutes are silent on the subject. *Clinton* v. *Englebrecht,* 13 Wall. 434; *Hornbuckle* v. *Toombs,* 18 Wall. 652; *Miles* v. *United States,* 103 U. S. 315; sec. 914, Revised Statutes, U. S.; *Reynolds* v. *United States,* 98 U. S. 145.

The laws of the United States being silent on the subject, Sec. 123 of Comp. Laws is the rule of decision in this case, and becomes applicable on the trial. Sec. 21, p. 397, Comp. Laws; Sec. 7, p. 571, Comp. Laws. Bigamy is a continuing offense. Sec. 72, p. 110, Comp. Laws; Sec. 123, p. 92, Comp. Laws.

Where there is no statute providing a form of marriage, it is not essential to prove a marriage by direct evidence. In support of the foregoing propositions the following cases are cited: *Taylor* v. *Sweet,* 3 La. 33, 22 Am. Dec. 156; *Holmes* v. *Holmes,* 6 La. 463, 26 Am. Dec. 482; *Sneed* v. *Ewing,* 5 J. J. Marsh, 460, 22 Am. Dec. 41; *Dyer* v. *Brannock,* 66 Mo. 391, 27 Am. Rep. 359; 1 Bishop, Mar. and Div., Secs. 488, 492; *Fornshill* v. *Murray,* Bland's Ch. 479, 18 Am. Dec. 344; *Hynes* v. *McDermott,* 91 N. Y. 451, 43 Am. Rep. 677.

FITZGERALD, J.—These three cases having been tried before the Third judicial district court, at Prescott, Chief Justice Howard, who presided at the trials, submitted the questions involved in the record on appeal to Judges Pinney and Fitzgerald. The facts involved in the three cases being similar, the questions of law in each case identical, (with the exception of the question of the admissibility of evidence of general reputation to prove the marriage relation, which question arose only in the *Case of Tenney*; no evidence of general reputation having been offered in the other cases,) by stipulation of parties the three cases were argued and submitted together.

The defendants were each convicted of the crime of polygamy, as charged in the first count of the respective indictments. Motion for a new trial was made in each case, and denied. The defendants were each sentenced to imprisonment in the Detroit house of correction for the period of three years and six months, and to pay a fine to the United States of $500. From the order overruling the motion for a new trial, and from the final judgment, the appeal is taken to this court.

The first assignment of error refers to the overruling of the demurrer to the first count of the indictment, on the ground that the facts alleged constituted two distinct causes of action. The first count, it is true, contains more than was necessary to properly charge the crime of polygamy, but the objectionable words, referring only to cohabitation after properly alleging the polygamous marriage, were clearly surplusage, and could not have misled or worked injury to the defendant. The first count charges the crime substantially in the language of the statute creating and defining the offense. The incorporating into the first count words in excess of what was absolutely necessary to charge the offense, not materially affecting, rendering doubtful, and by no possibility expanding, the offense charged, are but surplusage. It was clearly the intention of the pleader to charge the statutory offense of polygamy in the first and second counts of the indictment, and the offense of unlawful cohabitation by the third count. To say that the expansion of the first count, by the addition of language reciting cohabitation

after charging polygamy, and as following the polygamous marriage, could have misled or resulted injuriously to defendant is untenable. *People* v. *Cronin*, 34 Cal. 191; *People* v. *Murray*, 67 Cal. 103, 7 Pac. 176; *Lodano* v. *State*, 25 Ala. 64; *United States* v. *Simmons*, 96 U. S. 360; 1 Bish. Crim. Proc. 193, 274, 277, 360, 371. We are of the opinion that the ruling of the court below on the demurrer to the first count in the indictment was correct.

The second assignment refers to the ruling of the court in the *Tenney Case*, the question not arising in the other cases submitted, in allowing the witnesss Hubbell and Barth to testify to the general reputation, in the community where they lived, as to the relation of husband and wife existing between defendant Tenney and his wives. The jury were distinctly charged that the evidence of general reputation, standing alone, would amount to nothing in such a case; that it was only an incident and circumstance to be considered in connection with all the other proof and circumstances, there being no positive proof of an actual marriage ceremony, to enable the jury to find and determine either the main fact charged, the polygamous marriage, or the unlawful cohabitation. The doubt surrounding the admissibility of this character of evidence is removed by a reference to the territorial statute, to which it appears the trial court resorted, in the absence of a congressional enactment or regulation on the subject. Section 123, c. 10, Comp. Laws, provides:

"It shall not be necessary to prove either marriage by the register or certificate thereof, or other record evidence; *but the same may be proved by such evidence as is admissible to prove a marriage in other cases.*"

That reputation is competent in "other cases" there can be no doubt. 1 Bish. Mar. & Div 438, 439; 2 Greenl. 461, 462. If there was doubt as to the propriety of resorting to this character of evidence in a criminal case, in view of the statute above cited, and the charge of the court as to the proper application of that class of evidence that it was but secondary and circumstantial,—not sufficient in itself to warrant the finding of the polygamous marriage or cohabitation,—we are of the opinion that the defendant has no ground to complain of its admission. Considering the silence

of the United States statute, with the fact that the territorial act above referred to provides for this kind of proof in such cases, notwithstanding the claim made by appellants that the territorial practice act cannot be applied to proceedings for violations of congressional laws, the court seems to have been warranted in the resort to this class of evidence; especially when its weight and sufficiency was carefully guarded, as in this case. In view of the very positive charge of the court that the jury must find, in order to convict the defendant, the marriage to have been contracted and entered into within the Third judicial district of Arizona, and since the passage of the act of congress referred to, (March 22, 1882,) the correctness of the ruling in admitting the evidence as corroborative only, as the court directed, is beyond dispute.

The fourth assignment refers to the testimony admitted by the court as to facts occurring without the jurisdiction of the court more than three years before the finding and presentation of the indictment. A sufficient answer to this objection is found in the fact that the record shows the defense to have "opened the door," and by the introduction of evidence as to what had occurred in Utah and other places before the time when it was by the indictment alleged that the defendants committed the crime of polygamy in Arizona, fully justified the court in allowing the prosecution to follow the defense over the wide range it had covered by its questions to the witness.

We are of the opinion, however, that the evidence, when confined, as it was by the charge of the court, to an interpretation of the character of the relation existing between the defendant and his two wives; and guarded as it was by the emphatic charge of the court as to the duty of the jury in finding the polygamous marriage within the district, and within the time alleged in the indictment,—could have done no injury to the defendant. And in view of the fact that the defendant first introduced, by repeated questions to plaintiff's witnesses, this evidence to which he now objects, we hold that he should not now be heard to except to it. A party who shrinks from an exposure of his ancient peccadilloes ought not to put them in evidence; having done so, he cannot be heard to complain that the court allowed the other party to follow in his lead.

The fourth and fifth assignments are practically covered by the consideration of the last, except that portion of the fifth which refers to the use of the census returns by the witness Ruiz to refresh his recollection in regard to the facts appearing upon the face of the returns. The witness Ruiz was the census enumerator for Apache county. The census return filed in the office of the secretary of the territory is by the statute made an "official document," and evidence of its contents. The witness Ruiz, who took the census, was permitted to examine and refer to the returns thus filed by him with the secretary, to refresh his memory. In addition to which the witness stated that from his own recollection, irrespective of the official return, he was able to state what the accused gave him as the names and number of the members of his family at the time he took the census. Taking the statement of the witness, the official and authenticated character of the document referred to, we can conceive of no more correct method of proving the facts shown by the census return than was allowed in this case.

The sixth assignment is fully answered by the consideration of the fourth and fifth.

The remaining assignments of error upon which the appeals in these cases are based refer to the charge of the court. We might dispose of the question raised by these assignments by the simple statement that the exceptions to the charge of the court are general, not specific; and do not, *to any extent*, designate the particular charge, part of charge, modification of request, or refusal to charge, to which defendant takes exception, or which he here incorporates into the record as the basis of the allegation of the erroneous charge of the trial court. We prefer, however, to consider the charge upon its merits, as a correct exposition of the law applicable to the case. We enunciate as the correct principle, in the consideration of the charge of the court, that the whole and entire charge should be considered together; that a dissection and presentation of isolated, fragmentary portions of the charge, so separated and divided as to pervert the meaning and sense which would naturally follow a consideration of the whole, is not the legal or fair presentation to the appellate tribunal of the charge and

instructions of the trial court. The charge should be considered as a whole. The argument on appeal in these cases appears to have proceeded upon the erroneous impression on the part of appellants that while the indictment was found under the United States statute known as the "Edmunds Law," the trial and proceedings subsequent to arraignment were had under and pursuant to the territorial statute and practice. A reference to the record will show the fallacy of this claim, which is more than insinuated in the brief and argument of appellants. The trial court held that in a court with jurisdiction over offenses for violation of an act of congress, where the United States statutes were silent as to matters of practice, method of proof and procedure, the territorial statute might be invoked and applied to the case. Thus the United States statute being silent as to what shall constitute a marriage, as well as the method of proving marriage, the statute of the territory prescribing what shall be necessary to constitute a marriage, as well as the territorial law providing the manner of proving marriage, could be properly resorted to and applied. In this we think the trial court was clearly correct.

Congress has legislated for the punishment of the violation and prostitution of the marriage relation. It has not defined marriage. It has not formulated or provided any method or prescribed the character of proof in such cases. The alleged offense was committed, as the jury under the charge of the court below must of necessity have found, within the limits of the Third judicial district of the territory of Arizona, and within the time fixed as the limitation by the so-called "Edmunds Anti-Polygamy Law." To apply the existing territorial law defining marriage and prescribing the method of its proof, in our opinion was clearly within the rule recognized in all cases where congressional laws are sought to be enforced by courts possessing jurisdiction of United States cases in the territories. The assumption and assertion that the appellant was indicted under the law of congress, and tried under and by the rule of the territorial law, is not warranted by the facts disclosed by the record. The resort by the court to the territorial legislative definition of marriage, and the method of

its proof, suggests itself to us as not only proper, but the only course to pursue in the absence of congressional statute. *Clinton* v. *Englebrecht,* 13 Wall. 434; *Hornbuckle* v. *Toombs,* 18 Wall. 652; *Miles* v. *United States,* 103 U. S. 315; section 914, Rev. St. U. S.; *Reynolds* v. *United States,* 98 U. S. 145. The laws of the United States being silent on the subject, section 123, Comp. Laws Ariz. 1877, is the rule of decision in this case, and becomes applicable on the trial. Comp. Laws, § 21, p. 397; Comp. Laws, § 7, p. 571. The particular portion of the proceeding in the court below at which this objection is aimed by the seventh assignment of error is included in that part of the charge wherein the court read from the territorial statute, and commented as follows:

"This rule prevails, that where, in matters of practice, the statute laws of the United States are silent, in the territory or state where United States courts are held for the trial of causes under the United States statutes, the local statutes may be invoked for the purpose of interpreting the law governing the practice and conducting the proceedings of the court."

By a subsequent portion of the charge it is apparent, and the jury was so charged, that the interpretation referred to applied only to the constituent elements of a marriage contract, and to the method of its proof. This portion of the charge was confined to a reading of the statute, (section 1891, Comp. Laws Ariz.,) as follows:

"Sec. 1891. Marriage is considered in law as a civil contract to which the consent of the parties is essential."

As to the manner of proving polygamous marriages, the court referred to a portion of section 123, *c.* 10, Comp. Laws, which reads as follows:

"It shall not be necessary to prove either of said marriages by the register or certificate thereof, or other record evidence, but the same may be proved by such evidence as is admissible in other cases; and when such second marriage shall have taken place without this territory, cohabitation in this territory after said second marriage shall be deemed the commission of the crime of bigamy."

It is clear that, in the absence of this statute, a charge

to the jury instructing them as to the character of evidence to prove a marriage embodying the essential points covered by this statute would have been correct. It is beyond dispute that this reference to the statute is unobjectionable, when taken in connection with the other portions of the charge by which the jury were distinctly instructed that they must be satisfied that the first marriage existed; that the second marriage was contracted within the territory, and within the time fixed by the United States defining and punishing polygamy.

Upon a careful examination of the whole record, including the charge of the court in the three cases, we are satisfied that the defendants had fair and impartial trials. It is due the trial court to state that no precedents existed in this territory by which it might be guided in cases under the so-called "Edmunds Act." We fail to find in the record any material error. For these reasons the court is of the opinion that the motion for a new trial was properly overruled, and that the judgment was correct.

PINNEY, J.—The facts in these cases are conceded to be about the same in each case. The record in the *Tenney Case* is the only one brought up. Six witnesses were called and sworn on behalf of the government. The defendant introduced no proof in his own behalf. The question is, do the facts as testified to make a case in the law? The evidence, as given by the different witnesses, is nearly the same, and consists mainly in admissions made from time to time by the defendant. Tenney, the proofs show, lived with two women in the same house, and by them had several children which were admitted by the defendant to be his children. The women were known as Mrs. Anna Tenney and Mrs. Eliza Tenney. At the store of Mr. Barth, the defendant gave orders to let his two wives, Anna and Eliza, have goods, which was done at different times. and paid for by him. Mr. Traner, the clerk at the store, testified:

"He has acknowledged to me that these two women were his wives; that it was better to have two wives than be running around after other women."

Mr. Barth testifies:

"He always gave us orders to let the women and children have what they wanted when they came to the store, and charge it to him. He paid the account. The general reputation is that these two women are defendant's wives. At the windmill, three or four years ago, first one came in, (Anna.) and he said, 'This is my wife;' and then when Eliza came in, he said, 'This is my other wife.' "

And to all of the witnesses the defendant has, at different times and places, stated that both these women were his wives. In *Miles* v. *United States,* 103 U. S. 304, the defendant was indicted for bigamy. The indictment charged that "Miles did, on the twenty-fourth day of October, 1878, at Salt Lake county, in the territory of Utah, marry one Emily Spencer, and that afterwards, and on the same day, and at the same county, did marry one Catherine Owens." On the trial of that case certain declarations and admissions made by the defendant concerning his marriage were admitted in evidence. What those admissions were does not appear, but concerning them the Supreme court says:

"The declarations of plaintiff in error touching his marriage with Emily Spencer, admitted in evidence against him, appear to have been deliberately made, and under such circumstances as tended to show that they had reference to a formal marriage contract between him and her. We are of the opinion that the district court committed no error in admitting such declarations."

Counsel for defendant insists that the record in this case discloses no admissions by Tenney of any "formal marriage contract" with either Anna or Eliza, and no admission of any marriage contract at all, or marriage ceremony at all. It will not be denied but that the admissions and confessions of a defendant in a polygamy or bigamy case can be used and go to the jury for what they are worth. It is conceded by the able counsel in his argument in this case that if the admissions were precise declarations describing a time, a place, and a ceremony, that this would then become evidence of that ceremony. At the same time counsel insists that mere statements by defendant that these two women were his wives utterly fails to make such a case as

the law requires in actions of this character. I am not unmindful of the fact that confessions of marriage are sometimes made to justify the conduct and screen the party who happens to be living in open adultery. A confession may also be made of a supposed marriage when the party is ignorant of the law, and may honestly suppose a marriage to have taken place, when in fact no lawful marriage ever took place; and hence some cases may be found where the courts refuse to hold a marriage proven upon the unsupported admissions of the defendant. Each case must necessarily depend upon the particular circumstances surrounding it. An admission, deliberately made, "This is my wife," means something. Webster defines "wife" to be: "The lawful consort of a man; a woman who is united in the lawful bonds of wedlock." Why should not an admission of this character be entitled to as much weight as the testimony of one who saw the marriage ceremony performed, or to as much weight as the admissions of a party which tended to show they had reference to a formal marriage contract? It seems to me that if a man deliberately admits that the woman he lives with is his wife, that this is at least *prima facie* evidence that there had been a marriage contract between the parties. And when we add to this the fact that the parties had lived together as husband and wife for a long time, raised children, and held themselves out to the world as husband and wife, this ought to be pretty good proof of marriage, and all this appears in evidence.

The importance of these cases has caused me to add this much to what has been written by my associate. The orders and judgment of the court below are affirmed.

[Civil No. 150. Filed October 20, 1885.]

[S. C. 8 Pac. 302.]

RICHARD WOFFENDEN, Plaintiff and Appellant, v. PEDRO CHAROULEAU et al., Defendants and Respondents.

1. STATUTES CONSTRUED—COMPILED LAWS 1871, § 1, § 6, § 9 C. 32, AS

AMENDED DEC. 30, 1865, AND § 1 c. 32, AS AMENDED JAN. 22, 1871, ACT NO. 5, p. 5, LAWS OF 1885.

2. HUSBAND AND WIFE—RENTS AND PROFITS OF EITHER HUSBAND'S OR WIFE'S SEPARATE ESTATE COMMUNITY PROPERTY UNDER STATUTE.—Under § 9, *supra*, rents and profits of the separate estate of either husband or wife are common property.

3. SAME—RULE STATED CHANGED BY ACT NO. 5, LAWS OF 1885, *Supra*.—The legislature of 1885 changed and settled the law for the future to be that the rents, issues, and profits of the separate estate of either husband or wife are separate property.

Charouleau v. *Woffenden*, 1 ARIZ. 243, 25 Pac. 652, OVERRULED.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Affirmed.

The facts are stated in the opinion.

F. W. Gregg and H. R. Jeffords, for Appellants.

Farley and Franklin and Alexander Campbell, for Respondents.

The act of 1871 is in direct conflict with section 9, page 329, of the compiled laws, and has been declared so to be by this court in *Charouleau* v. *Woffenden*, 1 Ariz. 243, 25 Pac. 652; *Woffenden* v. *Charouleau*, 1 Ariz. 346, 25 Pac. 662, and substantially in *Miller* v. *Fisher*, 1 Ariz. 232, 25 Pac. 651. The reasoning of the court is unanswerable.

In *George* v. *Ransom*, 15 Cal. 322, 76 Am. Dec. 490, the Supreme Court of California decided that a section identical with section 9 was in direct violation of that section of the California constitution which provides that all real and personal property of the wife owned or claimed by her before marriage and that acquired afterward by gift, descent or devise shall be her separate property. See also Pomeroy's Equity Jurisprudence, vol. 3, § 1104 and § 1105, p. 26 to 29, inclusive, and note 1 to page 27.

2. The theory of the law of 1865, of which section 9 was a part, was that while the wife might remain the nominal owner of her separate property, her ownership for all substantial or beneficial purposes should be practically suspended during coverture, and the real ownership, that is to say, the right to use and enjoy, should be transferred to her husband. The theory of the act of 1871 is that married women may do what they please with their own.

PINNEY, J.—In June, 1882, appellant filed his complaint in the Pima district court, alleging that he and defendant Anna C. Woffenden were married in August, 1872, in the city of Tucson, and continued to be husband and wife until May, 1879, when they were divorced. The complaint then sets up that defendant Anna C. Woffenden acquired as community property certain lots and real property, some of this property being purchased by her in 1873, and some in 1874; and that during their marriage relation defendant Anna C. Woffenden received and appropriated to her own use the rents and profits of this real property; and that during the continuance of said marriage relation defendant Anna C. appointed defendant Jean P. Charouleau an agent to collect the rents and profits, and that since the dissolution of the marriage, defendant Charouleau has continued to collect and retain the rents and profits, but has refused, and still does refuse, to account for or pay to plaintiff any part thereof. The complaint then avers that defendant Charouleau gives out, asserts, and claims that he is the owner of the whole of the property described in complaint; that his pretense and claim is without right. Added to this is a prayer (1) for the appointment of a receiver to collect the rents and profits; (2) that defendants account to plaintiff, and pay over to him one-half of the rents and profits received from said lands since May, 1879; (3) that it be decreed that plaintiff is the owner of an undivided half interest in the lots and lands described; (4) that defendant Charouleau be forever enjoined and barred from asserting any title or claim to the same; (5) that the property described be equally divided between plaintiff and defendant Anna C.

The answer denies that plaintiff and defendant Anna C. acquired as community property the lots and lands set forth in complaint, and alleges that the same was bought and paid for by her with moneys possessed by her prior to her marriage with plaintiff; denies that defendant Anna C. received and appropriated to her own use and benefit any community property; denies that she appointed defendant Charouleau agent to collect rents and profits.

The separate answer of defendant Charouleau sets forth that he is the owner, in good faith, and for a valuable consideration, of the real estate described in complaint; that he purchased the same in June, 1875, and immediately entered into exclusive possession of the same.

At the trial in the court below the plaintiff proved that the defendant Anna C. Woffenden purchased the various parcels of land mentioned in the complaint with moneys which she collected from rents of her separate property, some of which she had before her marriage, and some she bought afterwards. The plaintiff then offered to prove that all the lands mentioned in complaint were purchased during coverture by Anna C. Woffenden from the rents, issues, and profits of her separate estate. This was objected to, and objection sustained by the court, for the reason that this court had in the case of *Charouleau* v. *Woffenden,* 1 Ariz. 243, 25 Pac. 652, decided that the rents and profits of a married woman were her own separate property, and not the common property of husband and wife. And the question is here again squarely presented: Do the rents, issues, and profits of a married woman's separate property become solely vested in her, or is the same community property?

If the legislature has by statute fixed the rights of husband and wife in plain and unambiguous language, then there is no room left for a construction by the court. Section 1, *c.* 32, provides:

"All property, both real and personal, of the wife owned by her before marriage, and that acquired afterwards by gift, devise, etc., shall be her separate property."

Section 6 of that chapter provides:

"The husband shall have the management and control

of the separate property of wife during the continuance of the marriage, but no sale or other alienation of any part of such property can be made, etc., unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon an examination separate and apart from her husband."

Section 9 of the same chapter provides:

"The husband shall have the entire management and control of the common property, with the like absolute power of disposition as to his own separate estate. And the rents and profits of the separate estate of either husband or wife shall be deemed common property, unless, in the case of the separate property of the wife, it shall be provided by the terms of the instrument whereby such property may have been bequeathed, devised, or given to her that the rents and profits of such property shall belong to the wife, and shall not be liable for the debts of the husband."

In 1871 an act relating to the separate property of married women was passed and approved, as follows:

"Section 1. Married women of the age of twenty-one years and upwards shall have the sole and exclusive control of their separate property, and may convey and transfer the lands, or any estate or interest therein, vested in or held by them in their own right, and without being joined by her husband in such conveyance, as fully and perfectly as they might do if unmarried.

"Sec. 2. All acts and parts of acts so far as they conflict with the provisions of this act are hereby repealed."

This act repeals section 1, *supra,* in so far as the same is in conflict therewith. The provisions of the act are clear and plain. The wife shall have full power to sell, etc., without joining her husband in the conveyance. It is perfectly clear, then, that under this law the wife had the right to sell and convey the property in dispute. It is also clear under section 9, *supra,* that the rents and profits of either husband or wife are common property. By that act it is provided that the wife shall have the sole and exclusive control of her separate property, with power to sell, etc.; nothing is said about the rents and profits, while the other portion of the statute stands in full force,

making the rents and profits common property. True, the wife has the right to sell and convey; but if she does not desire to do that, and prefers to retain, hold on to, and rent the same, then the rents received by her become common property, and the same could be reached by a creditor, or by the husband himself, if the action was brought in the proper time and manner. Should she use this common money received, for rents and profits, an action would lie for money had and received, and possibly, under a proper case, the husband might maintain an action against her for an interest in real estate purchased by her with this common money.

The record in this case shows defendant Charouleau to have been a *bona fide* purchaser of all the real estate in dispute, and whatever right of action the husband might have had against the wife, clear it is that the title of defendant Charouleau cannot be disturbed. The case of *Charouleau* v. *Woffenden*, 1 Ariz. 243, 25 Pac. 652, in so far as the same conflicts with this decision, is overruled. For the reasons given, the judgment and order appealed from are affirmed.

HOWARD, C. J.—I concur. The construction given by Mr. Justice Pinney to the statute referred to seems to be in accord with the views of the legislature of 1885, which body changed and settled the law for the future by enacting (act No. 5, p. 5) that "the rents, issues, and profits of the husband's separate property shall be his separate property, and the rents, issues, and profits of the wife's separate property shall be her separate property." It is reasonable to presume that this legislation came from the conviction that the former statute did not express the legislative intent to the same purpose and effect.

[Civil No. 149. Filed October 24, 1885.]

[S. C. sub nom. *Williams* v. *Tidball* and others, 8 Pac. 351.]

ZAN. L. TIDBALL et al., Defendants and Appellants, v. LESTER E. WILLIAMS, Plaintiff and Respondent.

1. FALSE IMPRISONMENT—WARRANT DESCRIBING PARTY BY FICTITIOUS NAME—UNITED STATES MARSHALL AUTHORIZED IN ARRESTING UNDER—ASSUMES RISK OF ARRESTING RIGHT MAN—MUST ACT IN GOOD FAITH AND EXERCISE DUE CARE.—The United States marshall is justified in making the arrest of a defendant, within his territory, who is described in the warrant by a fictitious name. He assumes only the risk, in executing such warrant, of arresting the right man If he acts in good faith and exercises due care, the defendant cannot complain. Section 1014 Rev. St. U. S. 1878 and § 89, chapt. 11, Comp. Laws Ariz. 1877. Cited.

2. UNITED STATES COMMISSIONERS—POWER TO ISSUE WARRANTS—§ 1014 U. S. REV. ST. 1878—JURISDICTION—ORDINARILY CONFINED TO DISTRICT—U. S. STATUTE CONFERS JURISDICTION CO-EXTENSIVE WITH TERRITORIAL LIMITS.—As a matter of proper practice United States Commissioners should, in ordinary cases, confine the exercise of their jurisdiction to the geographical limits of their district. Rev. St. U. S., *Supra,* confers power upon commissioners to issue warrants in cases for the violation of the Federal Statutes. This provision, in connection with other acts of Congress, expresses the intent of Congress to confer upon commissioners jurisdiction co-extensive with the limits of the territory or state.

3. STATUTES CONSTRUED.—Comp. Laws Ariz. 1877, p. 112, par. 503; Rev. St. U. S. 1878, § 1014.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Reversed.

The facts are stated in the opinion.

J. A. Zabriskie and J. A. Anderson, for Appellants.

The only questions presented by the record are:

(1) Can a warrant be issued for the arrest of an offender against the laws of the United States, in Arizona, without

specifying the true name of the offender, when the true name is unknown to the magistrate issuing the warrant?

Section 1014 of the revised statutes of the United States provides that the arrest may be made, agreeably to the usual mode of process against said offender in such state.

Section 89, chapter 2, of the compiled laws of Arizona, provides as follows: "The warrant must specify the name of the defendant, or if it be unknown to the magistrate, the defendant may be designated therein by any name."

The second question is, can a commissioner appointed for one Judicial District in Arizona issue a warrant for the arrest of an offender against the law of the United States, when the offense was committed in another Judicial District in Arizona, that will justify the marshall of the Territory in arresting the offender in the District where the offense was committed?

This involves the construction of section 1014 of the Revised Statutes of the United States. That section provides that the arrest may be made for any crime or offense against the United States. The arrest may be ordered "by any justice or judge of the United States, or by any commissioner of a Circuit Court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of peace, or other magistrate, of any state where he may be found."

In construing this statute Chief Justice Taney, when Attorney General of the United States, says: "The power to arrest for any offense against the United States is given in general terms; and so far as respects a judge or justice of the United States it is not even confined to his district or circuit, but his warrant would in my judgment run anywhere throughout the United States. * * * This provision of the act of Congress is a remedial one, and ought to be expounded so as to effectuate the manifest intention of the legislature. And there is nothing in the character of the provision that would justify us in giving an over strict interpretation to the law, and impute to it a meaning which everyone who reads the section will see that the legislature could not have intended."

Opinion in case of *Robert B. Randolph,* dated May 14,

1833. 2 Op. Att. Gen. (U. S.) 564; opinion to Mr. Seward, Secretary of State, dated Dec. 10, 1864. 11 Op. Att. Gen. (U. S.) 127.

Now the very same language that gives the power to the judge or justice of the United States gives it to the commissioners and there is no reason why the commissioners warrant should not run as far.

United States v. *Rundlett,* 2 Curt. C. C. 41, Fed. Cas. No. 16208; Brightly's Digest, 91.

But if the jurisdiction of the commissioner is not as extensive as that of the "judge or justice of the United States" it is certainly as extensive as that of the state officers.

The statute says "*any* crime or offense." There is therefore no need that the crime or offense should have been committed in the local jurisdiction of the officer ordering the arrest, nor even in the state where the officer resides. By the literal words of the statute the only elements of jurisdiction that need be made to appear to the officer issuing the order of arrest is (1) that a crime or offense against the United States has been committed, (2) that the offender "*may be found*" in the state where the officer resides. There cannot be a question but that the process of arrest will run throughout the state where the officer resides. The only doubt heretofore entertained is whether the process in any case could run beyond the limits of the state. We have seen that in the case of the judge or justice of the United States that it may run throughout the United States. Certainly state officers are not hemmed in by their local jurisdiction as state officers.

The obvious policy of the statute was to facilitate the arrest of an offender against the United States, when he is known or suspected to be within a given state. The statute delegates power to certain officials to issue warrants, who, when acting under the delegated power, are not acting in their ordinary official capacity, but as representatives of the United States for a certain purpose. This power delegated has nothing to do with the law creating their offices, and no connection with their local jurisdiction.

The statute is evidently one of convenience to render the apprehension of criminals possible.

To hold that the several United States commissioners of this Territory cannot issue warrants for the arrest of an offender against the United States laws in any part of the Territory to be executed by a marshall whose jurisdiction extends over the whole Territory is an over strict construction of the statute.

Thomas Mitchell, for Respondent.

HOWARD, C. J.—The only questions presented by the record in this case were:

First.—Is the United States marshal justified in making the arrest of a defendant, within his territory, who is described in the warrant by a fictitious name? We hold that he is, and that the marshal assumes only the risk and responsibility, in execution of such a warrant, of arresting the right man. If the marshal acts in good faith, and exercises due care, the defendant cannot complain. In this case it is not contended that the marshal arrested the wrong man. It is apparent that the respondent was the man complained of, and against whom the complaint was filed, although designated by a fictitious name. The suit against the marshal for false imprisonment, based upon the fact that defendant was not described in the warrant by his correct name, cannot be maintained. Section 1014, Rev. St. U. S., with section 89, *c.* 2, Comp. Laws Ariz., settle this question clearly in favor of the justification of the appellant in making the arrest.

The second and only remaining question presented by the record is involved in the fact that the United States commissioner who issued the warrant did not reside in the judicial district where it was alleged on the face of the warrant the offense was committed. We hold, in the reversal of the judgment in this case, that the United States marshal was protected and justified in making arrest by virtue of such a warrant. While it is true, as a matter of proper practice, that commissioners should, in ordinary cases, confine the exercise of their jurisdiction to the geographical limits of their district, yet the plain interpretation of the statute, (U. S. Rev. St. § 1014,) in cases for

the violation of the acts of the federal congress, clearly confers power upon the officers enumerated to issue warrants. This provision, when taken in connection with the other acts of congress applicable to the jurisdiction of United States commissioners, clearly expresses the intent of congress to confer upon commissioners jurisdiction co-extensive with the limits of the territory or state. By no act of congress has this power been limited to the geographical limits of the district or county where such commissioner may reside. The warrant by virtue of which the arrest was made, being regular on its face, was a protection to the officer executing it. For these reasons the judgment of the court below is reversed, and the case remanded to the trial court for new trial.

Fitzgerald, J., concurring.

MEMORANDUM DECISIONS

D. P. NICHOLS, Respondent, v. LEWIS RILEY et al., Appellants. (Civil No. 121.)

APPEAL from the District Court of the Third Judicial District in and for the County of Yavapai.

Clark Churchill, for Appellants.

C. B. Rush, for Respondent.

January 12, 1885. Reversed and remanded for new trial.

TRANQUILITY MINING COMPANY, Plaintiff and Respondent, v. HEAD CENTER CONSOLIDATED MINING COMPANY, Defendant and Appellant. (Civil No. 96.)

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

Garber, Thornton and Bishop, R. S. Mesick, and Geo. R. Williams, for Appellant.

Lewis and Dibble, for Respondent.

February 23, 1885. Dismissed.

JAMES REILLY, Respondent, v. S. B. COMSTOCK et al., Appellants. (Civil No. 138.)

APPEAL from the District Court of the Second Judicial District in and for the County of Cochise.

James Reilly, *in persona.*

No appearance for Appellants.

February 25, 1885. Dismissed.

JAMES REILLY, Admr., Respondent, v. M. E. CLARK, Appellant. (Civil No. 137.)

APPEAL from the District Court of the Second Judicial District in and for the County of Cochise.

No appearance for Appellants.

James Reilly, *in persona.*

February 25, 1885. Dismissed.

G. HOWARD THOMPSON, Appellant, v. C. P. DAKE et al., Respondents. (Civil No. 151.)

APPEAL from the District Court of the First Judicial District in and for the County of Pima.

Earll and Campbell, and Benjamin Morgan, for Appellant.

J. A. Zabriskie and J. A. Anderson, for Respondents.

February 27, 1885. Stricken from calendar by consent.

GUS BENSON, Respondent, v. WEBSTER STREET, Appellant. (Civil No. 152.)

APPEAL from the District Court of the Second Judicial District in and for the County of Cochise.

No appearance for Appellant.

G. G. Berry, for Respondent.

February 28, 1885. Dismissed upon stipulation.

ALEXANDER GRAYDON ET AL., Respondents, v. JOHN H. EATON et al., Appellants. (Civil No. 126.) Appeal from the District Court of the Second Judicial District in and for the County of Gila.

C. S. Farquar, for Appellants.

Lemon and McCabe, for Respondents.

March 2, 1885. Dismissed.

TERRITORY OF ARIZONA, Respondent, v. FREDRICK J. GLOVER, Appellant. (Criminal No. 32.)

Rush and Wells, for Appellant.

Clark Churchill, Atty. Gen., for Respondent.

March 3, 1885. Affirmed, without opinion.

T. A. BASHFORD, Respondent, v. GEORGE W. CURTIS, Appellant. (Civil No. 144.)

APPEAL from the District Court of the Third Judicial District in and for the County of Yavapai.

John C. Herndon and E. M. Sanford, for Appellant.

Rush and Wells, for Respondent.

March 3, 1885. Affirmed. (Note by Reporter. The record shows, "Opinion to be hereafter filed," but none appears in the records of the office of the Clerk of the Supreme Court.)

F. M. FOWLER, Appellant, v. E. W. BRYAN et al., Respondent. (Civil No. 141.)

APPEAL from the District Court of the Second Judicial District in and for the County of Maricopa.

Tweed, Hancock and Crenshaw, for Appellant.

Alsap and Baker, and Lemon and McCabe, for Respondents.

March 3, 1885. Affirmed. (Note by Reporter. The record shows, "Opinion to be hereafter filed," but none appears in the records of the office of the Clerk of the Supreme Court.)

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

Territory of Arizona,

During the Year 1886.

[Crim. No. 38. Filed March 18, 1886.]

[S. C. 10 Pac. 359.]

THE TERRITORY OF ARIZONA, Plaintiff and Respondent, v. ANDREW H. DAVIS, Defendant and Appellant.

1. JURORS—COMPETENCY OF—IMPRESSIONS FROM RUMOR AND NEWSPAPER ACCOUNTS—SUCH OPINION DOES NOT DISQUALIFY.—Where the opinion of the juror does not seem to be founded on any evidence at all, and is nothing more than a mere impression based upon what he has heard in the streets or read in the newspapers, such opinion can never be held to disqualify a juror at the present day

2. CRIMINAL LAW—CONTINUANCE—PRACTICE ON APPLICATION FOR—GRANTING MATTER OF DISCRETION WITH TRIAL COURT—NEW TRIAL—IMPROPER REFUSAL GROUND FOR—APPEAL AND ERROR—APPELLATE COURT WILL REVIEW ACTION OF TRIAL COURT IN REFUSING CONTINUANCE WHERE THERE IS ABUSE OF DISCRETION—STATUTE MAKES IMPROPER REFUSAL OF CONTINUANCE GROUND OF ERROR—COMP. LAWS 1877, p. 462, par. 2785, subd. 2.—Practice on application for continuance reviewed and facts held sufficient to have en-

titled defendant to continuance. A motion for a new trial based upon an improper refusal of such application for continuance should have been granted. It is settled doctrine that the right and power to grant continuances is lodged with the trial judge, but this principle is subordinate to and controlled by that other principle that, where the trial judge has been guilty of an abuse of discretion in declining or refusing to postpone a cause, an appellate court, if satisfied of that fact, may review his action, and grant a new trial. Besides the statute of this territory makes this refusal a ground of error. Statute *supra.*

3. SAME—EVIDENCE—*Res Gestae*—STATEMENTS OF DECEASED AT THE TIME OF SHOOTING.—Where the testimony shows that within two or three minutes of the time of the shooting the deceased made certain statements as to what happened such statements are a part of the *res gestae* and admissible.

4. SAME—CRIMINAL RESPONSIBILITY—INSANITY—DELIRIUM TREMENS AS DEFENSE—ALCOHOLISM MAY CAUSE INSANITY—RULE DIFFERENT FROM ORDINARY DRUNKENNESS.—A continuous and excessive use of ardent liquors may result in such a state of insanity as to relieve from criminal responsibility for acts done while in a condition of mind produced and caused by such excessive drinking. It is very different from acts produced in a state of ordinary intoxication, and must be governed by wholly different rules and principles.

5. SAME—EVIDENCE OF INSANITY FROM EXCESSIVE DRINKING ADMISSIBLE—ACTUAL DRUNKENNESS NOT NECESSARY—COMMENTS OF JUDGE ON EVIDENCE—INVASION OF PROVINCE OF JURY.—Evidence tending to show that from a continuous use of ardent spirits the mind of defendant had become weakened, and that he was suffering, at the time, from an attack of delirium tremens or alcoholism, admissible, though there was no pretense that he was actually drunk at the time of the shooting. Where such evidence was admitted by the trial court, comments by the court throughout the trial to the effect that such testimony was of no importance, without a showing that defendant was in an actual state of intoxication, was prejudicial error. This testimony was for the consideration of the jury, and to enable them to determine the condition of the mind of the defendant, at the time he fired the shot, necessary to a finding of the degree of the guilt of the defendant.

6. SAME—INSANITY—EXPERT TESTIMONY—QUALIFIED PHYSICIAN, NOT EXPERT ON INSANITY, COMPETENT TO TESTIFY AS TO EFFECT OF DRINK UPON PERSON SUFFERING FROM SPECIAL INJURIES.—Where testimony of physician, in active practice, was offered to show an injury to brain of defendant, and probable effects of alcoholism

in view of such injury, such offer should not be rejected because physician was not shown to be an expert on insanity.

7. SAME—EVIDENCE—CROSS-EXAMINATION OF DEFENDANT—NOT LIMITED TO EXAMINATION IN CHIEF—WHERE DEFENDANT VOLUNTARILY TAKES WITNESS STAND IN HIS OWN BEHALF RULES OF CROSS-EXAMINATION APPLICABLE TO ORDINARY WITNESSES GOVERN HIS EXAMINATION—STATUTE CITED COMP. LAWS 1877, p. 101, par. 408.—Cross-examination as to what defendant thought and intended to do at the time he fired the shot proper cross-examination where defendant went on the stand as a general witness in his own behalf. Under our statute, *supra*, there is no limitation that requires the cross-examination to be limited to matters about which the defendant was examined in chief. Where he voluntarily assumes the character of a witness he cannot interpose his privilege not to be compelled to testify against himself but must reply to legitimate cross-examination and *this* must be determined by the same rules applicable to the cross-examination of other witnesses

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Reversed.

The facts are stated in the opinion.

Goodrich and Smith, for Appellant.

Clark Churchill, Atty. Gen., for Respondent.

SHIELDS, C. J.—The defendant in this case, on the eighth day of June, 1885, at a session of the district court in and for the county of Cochise, was convicted of the crime of murder in the first degree, the jury affixing thereto the death penalty. He brings the case to this court, alleging various errors both in the admission and exclusion of testimony, and in the charge of the court. It is not deemed necessary to a disposition of the case to go into any very full or detailed statement of the testimony therein, or the facts as disclosed by the testimony. It is sufficient to say that on the seventeenth day of January, 1885, the defendant shot and killed one Matthew Alexander, in the town of Tombstone. The shooting occurred upon the street on the morning of the day last mentioned. The theory of

the prosecution was that the killing was wholly without excuse, or justification, and that the defendant was guilty of murder in the first degree. Upon the trial the defense was rested upon two grounds: *First,* that the killing was done in self-defense; *second,* that the defendant was in such a state of mind, produced by a continuous and excessive use of spirituous liquors, as not to be in a condition to know what he was doing or to be responsible for his acts. It is claimed that there are certain errors applicable to the case in general, and others bearing more directly upon the defense of insanity, that it is our duty to consider. Some of these it would be unnecessary to notice were it not that the case must go back for a new trial, and it is proper we should indicate our views on them.

The assignments of error, when grouped, present the following questions: *First,* were challenges to certain jurors by the accused improperly overruled? *Second,* was there an abuse of discretion on the part of the district court in declining and refusing to continue the cause? *Third,* should the testimony offered by the defendant, as to the effect upon his mind of his habits of intoxication, have been received? *Fourth,* was there error in the instructions given? These questions will be considered in their order.

1. As to the jurors. E. D. Waffle was called as a juror, and, questioned by the defendant's counsel, testified in substance that he was in Tombstone the day of the shooting, and heard of that fact, and that he had some opinion as to the guilt or innocence of the defendant; and, in reply to questions, he stated that the opinion he had was not a fixed or unalterable one; that, notwithstanding such opinion, he could sit on the jury and give the defendant a fair and impartial trial; that he would decide the cause upon the testimony given, and not upon his former opinion or impression; and, further, that the opinion which he had formed was one that would be changed by the testimony of witnesses upon the stand. We think the juror was entirely competent to sit in the case. The opinion of the juror did not seem to be founded on any evidence at all, and was nothing more than a mere impression based upon what he had heard in the street or read in the newspapers. Such an opinion

can never be held to disqualify a juror at the present day. *Staup* v. *Commonwealth,* 74 Pa. St. 458; *Reynolds* v. *United States,* 98 U. S. 145. In this latter case the question is quite fully discussed, and the rule laid down, which we adopt as the law applicable to this territory upon this subject.

2. As to the error alleged in not continuing or postponing the trial upon the application of the defendant. The record discloses that the defendant was put upon his trial on the twenty-eight day of May, 1885; that the jury disagreed; and that during the same term, and on the eighth day of June succeeding, he was placed upon trial again, in which trial a conviction was had. The defendant in due time filed an affidavit, setting forth the absence of a material witness, and set out at great length what he expected to prove by such witness. The affidavit in substance alleged that the witness was present at the first trial of the cause, and gave testimony therein; that, after he had so testified, he left the territory and went to New Mexico to attend to business there; that, immediately upon the court setting down the cause for trial the second time, the defendant procured a subpœna to be issued, and made every proper and possible exertion to secure the attendance of the absent witness, but that it was impossible to reach him, or to have him at the trial; and setting up the circumstances attending his departure, and the fact that the defendant would have him present at the next succeeding term of court. The affidavit then proceeds and sets out at considerable length the facts the defendant expected to prove and would prove by the absent witness; among others, that upon the night before the shooting the deceased came to the house where the defendant was stopping, and attempted to break into the house, and made threats against the defendant, among others, that he would take his life; and, further, that the defendant, from the excessive use of spirituous liquors, was mentally incapacitated and weakened to such a degree as not to fully understand or be responsible for his acts or conduct. It was made to appear that the trial court had informed counsel for defendant that the defendant would not be put upon trial again during the then present term,

and also that one of the counsel for defendant who took an active and leading part in the first trial had become sick and confined to his bed at the time the case was set for trial the second time. These facts so shown we think entitled the defendant to a postponement of the trial, and the refusal of the trial court to continue the cause, under the circumstances, was such an abuse of discretion as authorizes this court to review the same and his action therein. The motion for a new trial, based on this refusal, should have been granted. We do not propose by this to interfere with the settled doctrine that the right and power to grant continuances is lodged with the trial judge, but this principle is subordinate to and controlled by that other principle that, where the trial judge has been guilty of an abuse of discretion in declining or refusing to postpone or continue a cause, this court, if satisfied of that fact, may review the action, and grant a new trial. *Churchill* v. *Alpena Circuit Judge,* 56 Mich. 536; 23 N. W. 211. Besides, the statute of this territory makes this refusal a ground of error in the supreme court. See Comp. Laws, p. 462, § 2785, par. 2, which provides in substance that an appeal may be taken to the supreme court from any order of the district court granting or refusing a new trial, or which affects a substantial right in an action or special proceeding.

3. The testimony shows that, shortly after the deceased was shot, and within two or three minutes thereafter, he was carried to a drugstore a few feet from where he was shot, and instantly made a statement to the effect that the defendant called to him to get down on his knees, and that on his refusal to do so the defendant shot him. This testimony was objected to as incompetent and hearsay, but admitted by the court. We think the testimony was clearly competent and admissible. It was clearly part of the *res gestae* and admissible. *Hurd* v. *People,* 25 Mich. 405. In *Harriman* v. *Stowe,* 57 Mo. 93, it is held that where an accident happens, and the injured party declares to the physician, called soon after the accident, how it happened, such statement is admissible in evidence. In *Commonwealth* v. *McPike,* 3 Cush. 181, 50 Am. Dec. 727, it is held that, where a person immediately escaping from an assault declares who

did it, such declaration may be received in evidence. So the declaration of the party assaulted, made immediately after the assault, showing the character of the impression made at the time on his mind in regard to the nature of the attack, is admissible. *Monday* v. *State,* 32 Ga. 672, 79 Am. Dec. 314. In the present case the testimony shows that the statements proved were made to persons who were eye-witnesses of the transaction itself and the shooting, and within two or three minutes after the shot was fired. We think the statement clearly admissible.

4. The defendant alleges error with reference to the admission of testimony as to the effect upon his mind of the continuous use of intoxicating liquors. The defendant offered testimony tending to show that from a continuous use of ardent spirits his mind had become weakened, and that he was suffering, at the time, from an attack of *delirium tremens* or alcoholism. Both legal and medical writers recognize the fact that a continuous and excessive use of ardent liquors may result in such a state of insanity as to relieve from criminal responsibility for acts done while in a condition of mind produced and caused by such excessive drinking. It is very different from acts produced in a state of ordinary intoxication, and must be governed by wholly different rules and principles. The trials of causes, as reported, show that there is no species of insanity in which the mind is so completely filled with hallucinations as that produced by this means. In the case before us the defendant claims that certain proof offered by him bearing upon this point was improperly excluded. It is said by the attorney general, in reply to this, that although in the beginning the trial judge expressed the opinion that such proof was not competent, that still the question was gone into fully by the witnesses for the defendant, who answered such questions as were put to them on that subject. We think from an examination of the record that this is so; but we find, further, that the whole effect of this testimony was destroyed by the remarks of the district judge throughout the trial, to the effect that such testimony was of no importance at all, and could effect nothing on behalf of the defendant, unless it could be shown that he was in an actual state of intoxi-

cation; in other words, that he was drunk at the time of the shooting. We are of the opinion that this was an error equally as prejudicial to the rights of the defendant as if the judge had in the first instance excluded the testimony of the defendant bearing upon this point. There was no pretense that the defendant was actually drunk at the time of the shooting, nor was it necessary that there should be. The result of an examination of the criminal cases where this defense was made, as well as an examination of the medical authorities upon the subject, show that acts of violence on the part of the victim of this unfortunate habit of alcoholism are often committed while he is recovering from his debauch. We do not, however, intimate that the facts in this case were such as to show the defendant in that condition of mind as not to be responsible for his acts, but we think he was clearly entitled to have all the facts and circumstances bearing upon his condition of mind fairly submitted to the jury who must under all these facts and circumstances, determine whether or not he was responsible for what he did. This sort of testimony was for the consideration of the jury, and with a view of enabling them to determine the condition of the mind of the defendant at the time he fired the shot. Was he, at such time, by reason of his previous habits of intoxication, rendered incapable of forming the intention, or of exercising the deliberation and premeditation, which are essential to the existence of murder in the first degree, of which the defendant was convicted? Or, upon the contrary, was his mind so broken down and destroyed as to render him incapable of forming such an intention? It was important to determine these questions, for only by so doing could the jury come to the conclusion that the offense was murder of the first or second degree or manslaughter. It was defendant's right, therefore, to have all of this testimony so offered given freely and fairly to the jury, so that from it they could pass upon the degree of the guilt of the defendant.

The defendant put upon the stand Dr. Dunn, a physician, in active practice in Tombstone, and offered to show by him an injury or depression of the skull or brain of the defendant, and the probable effect of the continuous use

of strong drink upon the defendant, in view of such depression or injury. The district judge excluded this testimony, upon the ground that the physician was not shown to have had experience in the treatment or care of insane persons, and was not an expert on the subject of insanity. We think this was error. It was perfectly competent to show by this physician the injuries offered to be proven, and what effect, in his judgment as a physician, in view of such a condition of the head and skull as described by him, the use of spirituous liquors would have upon the defendant. To entitle him to give this testimony it was not necessary that the physician should have come from an asylum, or had the care of insane patients. His position as a physician entitled him to give his experience and judgment on the matters and questions that were submitted to him.

5. Certain errors are alleged with reference to the cross-examination of the defendant, who went on the stand as a general witness on his own behalf. When upon the stand, he was cross-examined as to what he *thought* and *intended* to do at the time he fired the shot. This was clearly proper cross-examination. No question seems to have been asked beyond those indicated, and certainly the defendant could not complain so long as the questions were confined to that limit. The defendant went on the stand as a general witness in his own behalf, and testified fully as to the shooting, as well as to the circumstances occurring the night before. In view of such fact, the cross-examination might very properly have been extended beyond the point where it did actually stop, had the prosecution seen fit to pursue it further. *Stover* v. *State*, 56 N. Y. 315; *People* v. *Reinhart*, 39 Cal. 449; *People* v. *Russel*, 46 Cal. 121; *Commonwealth* v. *Price*, 10 Gray, 472, 71 Am. Dec. 668; *People* v. *Beck*, 58 Cal. 212. These California cases were under a statute which required the cross-examination to be confined to matters about which the prisoner was examined in chief. In our statute on the subject there is no such limitation. Comp. Laws, p. 101, § 408. This rule does not violate the principle that a person accused of crime shall not be compelled to testify against himself; but this is a privilege which a defendant upon trial may waive, and when he does so, and goes upon the stand as a

general witness in his own behalf, he may be examined and cross-examined, as any other witness. In such case he voluntarily assumes the character of a witness, and cannot interpose his privilege, and refuse to answer such questions as are put to him in a legitimate cross-examination, and *this* must be determined by the same rules applicable to the cross-examination of other witnesses.

This disposes of all the question raised on the trial except those alleging error in the instructions given. We do not deem it necessary, however, to consider this branch of the case.

The sentence and judgment of the court below are reversed, and a new trial granted.

[S. C. 10 Pac. 368.]

[Crim. No. 37. Filed March 18, 1886.]

THE TERRITORY OF ARIZONA, Plaintiff and Respondent, v. JERRY RICHMOND, Defendant and Appellant.

1. CRIMINAL LAW—RAPE—EVIDENCE—REPUTE FOR CHASTITY OF HOUSE WHERE PROSECUTING WITNESS THIRTEEN YEARS OF AGE LIVED IMMATERIAL.—The general bad reputation for chastity of the house where the prosecuting witness lived is immaterial where the record shows that she was thirteen years old, and lived alone with her mother.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Graham. Affirmed.

The facts are stated in the opinion.

P. M. Thurmond, for Appellant.

Clark Churchill, Atty. Gen., for Respondent.

Per Curiam.—This was an indictment charging Jerry Richmond with the crime of rape upon the person of Minnie

Eichler. The cause was tried in Graham county, and he was found guilty, and sentenced to a term of five years in the territorial prison. We have examined the evidence in the case, and are of the opinion that the evidence sustains the conviction. It is urged that the court erred in not permitting evidence to go to the jury on behalf of defendant that the house in which she lived was a house of bad repute for chastity. The record shows that she was 13 years old; that she lived with her mother; and that no other person occupied the house with them. In such case, the general reputation of the house was not material. No other error is pointed out.

The judgment is affirmed.

[Crim. No. 36. Filed March 18, 1886.]

[S. C. 10 Pac. 367.]

THE TERRITORY OF ARIZONA, Plaintiff and Respondent, v. FRANK NELIGH et al., Defendants and Respondents.

1. CRIMINAL LAW—APPEAL AND ERROR—TRANSCRIPT OF REPORTER'S NOTES—RECORD DEFECTIVELY CERTIFIED—EFFECT AS BILL OF EXCEPTIONS.—Neither the reporter's transcript of the testimony nor papers bearing the certificate of the clerk, where such certificate does not show that the record of the action is sent up, but only such portions thereof as are mentioned in such certificate, can have the effect of a bill of exceptions.

2. SAME—APPEAL AND ERROR—INSTRUCTIONS—REFUSAL OF REQUESTS TO INSTRUCT WILL NOT BE REVIEWED WHEN TESTIMONY AND INSTRUCTIONS GIVEN ARE NOT IN RECORD.—Where the testimony and instructions actually given are not in the record on appeal refusal of requests to instruct will not be reviewed.

3. SAME—EVIDENCE—UNCORROBORATED TESTIMONY OF ACCOMPLICE INSUFFICIENT TO CONVICT.—The jury should not find the defendants guilty from the uncorroborated testimony of an accomplice.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Graham. Affirmed.

The facts are stated in the opinion.

P. J. Bolan and F. H. Hereford, for Appellants.

Clark Churchill, Atty. Gen., for Respondent.

Per Curiam. The defendants were convicted of the crime of grand larceny, at a session of the district court in and for the county of Graham, on the thirteenth day of September, A. D. 1884. They now bring error, and ask a review by this court of the proceedings upon such trial.

The case is in no shape to present any of the questions, if we saw fit to rule upon them. There is no bill of exceptions at all, but simply a mass of papers which are stated by the stenographer of the court to be the testimony in the cause. Such papers, it is needless to say, cannot have the effect of a bill of exceptions. The papers presented to us are defective in others respects. The certificate of the clerk does not show that the record of the action is sent up, but only such portions thereof as are mentioned by him in his certificate. Of course, such papers could not have the effect of a bill of exceptions. We have, however, looked through this mass of testimony returned, and have satisfied ourselves that the defendants had a fair and impartial trial, and that no exceptions to rulings were taken that have any merit to them at all, or that in the slightest degree prejudiced the rights of the defendants.

Two instructions were given, which, it is insisted, were wrong, and the giving of them was such error as should work a reversal of the conviction. These were as follows:

(1) "The jury are further instructed that when a witness swears to a certain fact, at a certain time, and afterwards swears differently at another time, his whole evidence must be looked upon with suspicion."

(2) "The jury are instructed if they believe from the evidence that the witness Sloan was an accomplice, then he must be corroborated by other evidence."

As to the first request, it is not necessary to say whether it is good or bad law. The testimony is not here so that we could see, so we are unable to say whether it was warranted

by the testimony or not. In the second place, the instructions as actually given are not before us, so that we do not know but that the request was substantially given in the general instructions of the court.

As to the second request, we do not think it is in such form as to reach the point aimed at by counsel, which undoubtedly was that the jury should not find the defendants guilty from the uncorroborated testimony of an accomplice. This states the law of this territory correctly. It could do no harm, however, as we fail to see anything in the testimony that is sent up here that would indicate that Sloan is an accomplice. We have looked through this mass of testimony before us, and there is nothing in it to indicate that Sloan was in any manner or in any form an accomplice. He testified to seeing the defendants killing the cattle, and that is all upon which the request could have been based.

It is not necessary to consider the cause further. The conviction below will be affirmed.

[Civil No. 153. Filed May 24, 1886.]

[S. C. 11 Pac. 44.]

MORRIS ASHER et al., Plaintiffs and Respondents, v. JOSEPH COX et al., Defendants and Appellants.

1. MORTGAGES—FORECLOSURE—WRIT OF ASSISTANCE—GRANTING IMPROVIDENT WHERE PARTIES IN POSSESSION CLAIM PARAMOUNT TITLE AND ARE NOT CONCLUDED BY FORECLOSURE PROCEEDINGS—WHEN PROPER—PRACTICE.—Where persons, not parties to foreclosure proceedings nor concluded thereby, claiming under paramount title, are in possession of mortgaged mining claims, it is improper for the court to determine the question of right of possession and title upon affidavits filed on application for a writ of assistance. These matters can only be settled in a suit for that purpose and the persons in possession are entitled to their day in court. It is only where a party concluded by foreclosure proceedings, refuses to give up possession on demand that a writ of assistance is proper. This, and that the party *is in fault* must be shown on the application for the writ.

APPEAL from a judgment of the District Court of the

Second Judicial District in and for the County of Maricopa. Reversed.

The facts are stated in the opinion.

H. B. Lighthizer and John T. Alsap, for Appellants.

The respondents, Thos. Sherman & Co., are not parties to the original action, and are in possession of the mortgaged premises adversely both to the defendant and all other claimants, except the United States, and the writ of assistance cannot issue against them because they are neither parties to the suit nor are they bound by the decree. *Burton* v. *Lies*, 21 Cal. 87.

Such writ is proper only where a party, concluded by the proceedings, refuses to give up possession on request. *Howard* v. *Bond*, 42 Mich. 131, 3 N. W. 289.

It will not be granted against one, not a party to the record, who is claiming adversely and independently of the parties to the record, and who cannot appear and defend his rights before the court. *Gilpeke* v. *Milwaukee etc. R. R. Co.*, 11 Wis. 454.

The writ will not issue against a purchaser *pendente lite*, or subsequent to judgment who is not a party to the action and has no notice, actual or constructive, of its pendency. Sec. 3, Act 42, March 3rd, 1883, S. L. p. 113; *Harlan* v. *Rackerby*, 24 Cal. 561; *Montgomery* v. *Byers*, 21 Id. 107; 3 Estes Pleadings, pages 35-42.

A question of legal title will not be tried on an application for this writ, nor will the writ be granted in a doubtful case. *Langley* v. *Voll*, 54 Cal. 435-438; *Barton* v. *Beatty*, 28 N. J. Eq. 412

A. C. Baker and Tweed & Hancock, for Respondents.

Writ of assistance the appropriate remedy to place purchaser in possession of premises sold at sheriff's sale, under decree of foreclosure of mortgage. *Montgomery* v. *Tutt*, 11 Cal. 191; *Reynolds* v. *Harris*, 14 Cal. 667, 76 Am. Dec. 459.

All persons coming in under defendant in the suit must

go out under the writ, and, *prima facie*, all who come into possession after action brought will be regarded as coming in under the defendant. *Wetherby* v. *Dunn*, 36 Cal. 147, 95 Am. Dec. 166; *Skinner* v. *Beatty*, 16 Cal. 158; *Sampson* v. *Ohleyer*, 22 Cal. 201; *Birdsall* v. *Phillips*, 17 Wend. 464.

The sheriff's certificate, filed in the Recorder's office, gave appellants constructive notice. Compiled Laws, p. 444, Sec. 231; *Page* v. *Rogers*, 31 Cal. 309.

No collusion will be tolerated. Mere tricks and devices to rob the plaintiff of the result of his litigation will not be tolerated. Freeman on Executions, p. 476; *Leese* v. *Clark*, 29 Cal. 665.

SHIELDS, C. J.—This is an appeal from an order of the district court of the Second judicial district, allowing a writ of assistance in a cause pending therein. The facts, so far as necessary to state them, are as follows: In April, 1883, Joseph Cox, one of the defendants, executed a mortgage to the plaintiffs on an undivided one-third interest in the Red Rover mine, in Maricopa county; he at that time claiming to be the owner of the remaining two-thirds of the mine, according to plaintiffs' showing. In 1884 this mortgage was foreclosed, and a decree entered in favor of the plaintiffs. At that time, and previously thereto, the defendants Hall, Greenhow and Sherman were in possession of the mine, claiming to be the absolute owners thereof. The plaintiffs thereupon applied, by petition, to the district court, for a writ of assistance to put out these last-named persons from the mine, and to put themselves in the possession thereof. The defendants Hall, Greenhow and Sherman, who were not parties to the foreclosure suit at all, were cited to show cause why the writ of assistance should not issue as prayed in the petition of plaintiffs. They showed cause, claiming then, as they do now, to be the owners of the property by virtue of a valid location of the same as the Dirty Rover mine; that Cox and Demarboix prior to such location had openly and notoriously abandoned their location thereof as the Red Rover, and that the mortgage is wholly without force as against the claim, location and title of the defendants, Hall Sherman and Greenhow; and such was the claim of these

defendants last named in the hearing of the petition. The court below ordered the writ of assistance to issue as prayed, and that plaintiffs be put in possession of the entire mine.

This was erroneous, and must be set aside.

1. Here was a plain contest between the plaintiffs on the one side, and the defendants Hall, Greenhow and Sherman on the other, as to the title and ownership of the mine. The district court, on this application of the plaintiffs for the writ of assistance, undertook to settle the legal and equitable rights of the parties to the mine, and to decide who was the true owner thereof; and this the court undertook to do upon affidavits. This was improper. The matter arising upon these affidavits can be properly settled only in a regular suit for that purpose. Hall and the other two defendants just named claim to own the mine in controversy by a title paramount to that of the plaintiffs or Cox. It would be most unjust to drive them from the possession of their property without giving them their day in court, or allowing them a chance to have their rights adjudicated. *Henderson* v. *McTucker,* 45 Cal. 647; *Langley* v. *Voll,* 54 Cal. 435.

2. The defendants Hall, Sherman and Greenhow were neither of them parties to the foreclosure suit in which the application for the writ of assistance was issued. It is only where a party concluded by the proceedings refuses to give up possession on demand that a writ of assistance is proper. This, and that the party *is in fault,* must be shown on the application for the writ. It is plain that these persons named were not in default, as they were not parties to the suit, nor concluded by the decree therein. *Henderson* v. *McTucker,* 45 Cal. 647; *Howard* v. *Bond,* 42 Mich. 131; 3 N. W. 289; *Burton* v. *Lies,* 21 Cal. 87.

It is unnecessary to consider the case further. The writ was improvidently issued, and must be set aside, and the order allowing it must be reversed.

Barnes and Porter, JJ., concurred.

[Civil No. 162. Filed May 30, 1886.]

[S. C. 11 Pac. 58.]

E. ROCHESTER, Plaintiff and Appellant, v. M. J. SULLIVAN et al., Defendants and Respondents.

1. FRAUDULENT CONVEYANCE—STATUTE OF FRAUDS—COMP. LAWS 1877, p. 363 par. 2133 CONSTRUED.—§ 20 of chap. 36 of the Compiled Laws, *idem supra*, is a limitation upon the absolute right of disposition of property by its owner, in that he may not sell and convey his property if in so doing he have the express or implied intent to hinder, delay or defraud his creditors.

2. SAME—ASSIGNMENT FOR BENEFIT OF CREDITORS—BURDEN OF PROOF OF FRAUDULENT INTENT ON CREDITOR ATTACKING CONVEYANCE—CONSTRUCTION OF SUCH CONVEYANCES—FAILING DEBTOR MAY ASSIGN FOR BENEFIT OF CREDITORS—ASSIGNMENT VOID IF FRAUDULENT INTFNT BE PROVED OR THE ASSIGNMENT SHOWS AN ACTUAL FRAUD.—Where it is charged that a conveyance is of this character, the onus is upon the creditor who assails the assignment to show that it is in plain violation of the law. The same fair and reasonable rules of construction must be applied to such conveyances as are adopted in ascertaining the meaning of other instruments. The doctrine that a man in failing circumstances may assign his property for the benefit of all his creditors, provided he does so in good faith, has become too well established to now be questioned. If, however, a fraudulent intent be proved, or if the terms of the assignment itself show that a fraud has actually been committed the assignment is in violation of the statute and void.

3. SAME—CONSTRUCTION—PROVISION FOR POSSESSION BY GRANTOR OF REAL ESTATE NOT PRESUMPTIVE FRAUD—RULE AS TO RETENTION OF POSSESSION IN TRANSFERS OF REAL PROPERTY DIFFERENT FROM TRANSFERS OF PERSONAL PROPERTY—UNREASONABLE DELAY IN SELLING ASSIGNED PROPERTY—ONE YEAR REASONABLE TIME.—Where a conveyance of real property is made to a trustee for the benefit of the creditors of the grantor, with a provision for possession by the vendor, such provision is not presumptive evidence of fraud, though it would be had personal property been assigned. To hold otherwise would be in effect to abolish the distinction between personal and real property, and to lose sight of the different methods of conveying the title to the two kinds of property. It is the law that the postponement to an unreasonable time of the time of sale will avoid the assignment. Less than one year is not unreasonable.

4. SAME—WHERE ASSIGNMENT SHOWS THAT THE PROPERTY IS TO BE DEVOTED TO THE PAYMENT OF ALL DEBTS OF GRANTORS AND THERE IS NO EVIDENCE OF FRAUD IN FACT PRESUMPTION IN FAVOR OF VALIDITY.—Where an assignment places the property in the hands of a trustee to be devoted to the payment of all the debts of the grantors, with no evidence of fraud in fact, the court must assume that it was made in good faith, and for the benefit of the creditors, rather than for their injury, and the court cannot say that it is fraudulent as a matter of law.

APPEAL from a judgment of the County Court of Pima County. Affirmed.

The facts are stated in the opinion.

Hereford & Lovell, for Appellant. Haynes & Stiles, of Counsel.

The conveyance shows upon its face that it was made to hinder, delay and defraud creditors, and falls fully within the prohibitions contained in sections 20, chapter 36 of the Compiled Laws, concerning fraudulent conveyances. The intention of the assignors to be gathered from the instrument. Wait on Fraudulent Conveyances, paragraphs 9-10.

Words hinder, delay or defraud not synonymous. A conveyance made either to hinder, delay or defraud is void. Wait, par. 11; *Crow* v. *Beardsley*, 68 Mo. 439; *Burgert* v. *Borchert*, 59 Mo. 83.

A fraud upon creditors is any act which by intention withdraws the property of the debtor from their reach. *McKibbin* v. *Martin*, 64 Pa. St. 352, 3 Am. Rep. 588.

Purpose to hinder and delay clear upon face of instrument because it expressly delays for six months. Bump on Fraudulent Conveyances, page 412.

See Pomeroy's Equity, paragraph 994, and note I; Bump on Fraudulent Conveyances, page 368; *Grover* v. *Wakeman*, II Wend. 187, 25 Am. Dec. 624; Legal right in Bump on fraudulent conveyances, pages 370, 371, 411; *Van Nest* v. *Voe*, I. Sanford Chancery, page 4; *Planck* v. *Schermerhorn*, 3 Barb. Ch. 644; *London* v. *Parsley*, 52 N. C. 313; *Burt* v. *McKenstry*, 4 Minn. 204, 77 Am. Dec. 507; *Lehmer* v. *Herr*,

62 Ky. (I. Duvall) 360; *Holmberg* v. *Dean,* 21 Kan. 73; *Gardner* v. *Commercial Bank,* 95 Ill. 298, 10 Reporter, page 300; *German Ins. Bank* v. *Nunes,* 14 Reporter, 206.

Where it appears from the face of the assignment that it was made to prevent a sacrifice of the property in the interest of the assignor and not the creditors, such deed is fraudulent and void as to creditors. Wait on Fraudulent Conveyances, sec. 325, and note containing citations. *Dunham* v. *Watter-mon,* 17 N. Y. 9, 72 Am. Dec. 406; Burrill on Assignments, 3d Edition, page 471, 460 and notes 3 and 4.

Anderson & Anderson, for Respondents.

The general rules of construction of assignments for benefit of creditors are the same as those applicable to other instruments. Wait on Fraudulent Conveyances, sec. 343. Bump on Fraudulent Conveyances, 367; Burrill on Assignments, pp. 456-7.

In Arizona there is no special legislation on this subject. Such instruments are regulated by the Territorial Statutes on fraudulent conveyancing which are substantially the same as 13 Eliz. C. 5, the statutes of conveyancing in general, and the common law. Burrill on Assignments, Chap. II.

The "Insolvent Act," passed at the last session of the Arizona Legislature, does not take away the right to make general assignment for the benefit of creditors. That right exists independently of statute, and is based upon the common law. Burrill on Assignments, sec. 47; *Cook* v. *Rogers,* 31 Mich. 396; *Mayer* v. *Hellman,* 13 N. B. R. 440; Burrill on Assmts. page 68, note I.

Condition that no sale shall be made does not make the instrument void. Burrill on Assignments, sec. 298; Bump on Fraud. Con. p. 411; Burrill, sec. 206.

A reasonable time to execute the trust is allowed by the law, and in this connection has regard to the character of the property and the condition of the markets. Bump Fraud. Con. p. 411; Burrill on Assmts. sec. 214.

For what constitutes reasonable time, see *Hafner* v. *Irwin,* 23 N. C. 490; *Carnon* v. *Peebles,* 27 N. C. 449; *Gilmer* v. *Earnhardt,* 46 N. C. 559; *Young* v. *Bool,* 83 N. C. 347; *Mc-*

Coy v. *Hugus,* 6 Watts, 345; *Graham* v. *Lockhart,* 8 Ala. 9; *Farquharson* v. *McDonald,* 2 Heisk. 404; *Coleman* v. *Raynor,* 3 Cold. 28; Bump Fraud. Con. p. 412, note; *Dana* v. *Bank of United States,* 5 W. & S. 223; Burrill on Assignments, sec. 214; *Dance* v. *Seaman,* 11 Gratt. 778; *Cochran* v. *Paris,* 11 Gratt. 348; *Gilmer* v. *Earnhardt,* 46 N. C. 559; *Farmers' Bk. of Va.* v. *Douglas,* 11 S. & M. 469; *Bennett* v. *Union Bk. of Tenn.,* 5 Humph. 612.

Upon the face of the deed there is nothing to indicate that the assignees were insolvent. "The burden of proving insolvency rests upon the creditor assailing the assignment." Bump's Fraud. Con. p. 374.

Definitions of insolvency contained in Wait on Fraud. Con., sec. 143; Burrill on Assmts., secs. 62 and 63.

BARNES, J.—This was a suit to set aside a conveyance made by the appellees of the property described in the conveyance, on the ground that it was executed to hinder delay, and defraud creditors, in violation of section 20 of chapter 36 of the Compiled Laws of the territory of Arizona. The appellees, it appears, were indebted to L. Zeckendorf & Co. in the sum of about $1,500, and to the appellant in the sum of $960, and to two other creditors to the amount of about $800. The deed conveys to Albert Steinfield, of the firm of L. Zeckendorf & Co., in trust to secure the payment of the said indebtedness. It provides that six months from its date sufficient of the property is to be sold at public sale to pay one-half of the indebtedness, and, at the expiration of one year, the remainder is to be sold, and the proceeds to be paid on the remainder of the indebtedness. The grantors were to retain possession of the property until sales were made. The deed was executed on the first day of July, 1885, and on the seventh day of September, 1885, appellant obtained judgment against appellees for the amount of their debt. Execution was issued and retained *nulla bona.* Appellant then commenced this suit to set aside the deed of assignment, on the ground that it was made with the intent to hinder, delay and defraud creditors. No evidence was introduced outside of the deed, and it is not claimed that there was any fraud in fact in the execution of the deed; but it is insisted that

the deed upon its face, as a matter of law, is fraudulent and void.

Section 20 of chapter 36 of the Compiled Laws of Arizona is similar to statutes which have been enacted in nearly all the states, and is an enactment of the statute 13 Eliz. c. 5, commonly known as the "Statute of Elizabeth." Probably there is no legislation which has been engrafted onto the common law of England which has been more discussed by the bar, and considered by the courts, and written about by the commentators of the law. Prior to that statute the owner had absolute dominion over his own property, to do with it according to his own good will and pleasure; and, within the limits prescribed by law, might make any disposition of it. He might sell it or give it away; he might contract debts to be satisfied out of it; confess judgments and create liens upon it. Bump. Fraud. Conv. 13. This act of 13 Eliz. is a limitation upon that right, and the owner may not sell and convey his property if in so doing he have the express or implied intent to hinder, delay or defraud his creditors. Where it is charged that a conveyance is of this character, the *onus* is upon the creditor who assails the assignment to show that it is in plain violation of the law. *Townsend* v. *Stearns,* 32 N. Y. 209; *Kruse* v. *Pringle,* 8 Or. 158. The same fair and reasonable rules of construction must be applied to such conveyances as are adopted in ascertaining the meaning of other instruments. *Whipple* v. *Pope,* 33 Ill. 334; Bump. Fraud. Conv. 365. This statute was carefully construed in *Meux* v. *Howell,* 4 East, 1, 13. In the court of the king's bench Lord Ellenborough there held that "while every assignment of a man's property, however good and honest the consideration, must diminish the fund out of which satisfaction is to be made to his creditors, yet that assignment must be devised of malice, fraud or the like to bring it within the statute." In the case of *Pickstock* v. *Lyster,* 3 Maule & S. 371, it was held that "the actual intent to defeat the particular creditor of his execution was not considered of itself sufficient to defeat the statute, the assignment being for the benefit of all the creditors." The supreme court of the United States in *Reed* v. *McIntyre,* 98 U. S. 507, quotes this case with approbation, and lays down the doctrine that

where the provisions of the assignment are consistent with an honest purpose to deal honestly and fairly with the creditors, the assignment reserving for the benefit of the debtor or his family no interest in the property, and imposing no improper restrictions upon its speedy sale and satisfaction of the debts, the consequent temporary delay in the prosecution by particular creditors of their claims by the ordinary legal remedies was regarded as a necessary and unavoidable incident of a discharge by a debtor of his duty to creditors. In *Pickstock* v. *Lyster,* 3 Maule & S 371. Lord Ellenborough held that the deed was not fraudulent, but was for the fair purpose of equal distribution, and Bagley, J., said: "It seems to me that this conveyance, so far from being fraudulent, was the most honest act the party could do." To the like effect are the authorities generally, as will be seen from an examination of the adjudicated cases cited in Burrill, Assign, § 319, and 1 Amer. Lead. Cas. 71, and *Reed* v. *McIntyre,* 98 U. S. 507. The same doctrine has been decided in New York, *Wilder* v. *Winne,* 6 Cow. 284; *Wilder* v. *Fondey,* 4 Wend. 100; in Louisiana, *United States* v. *United States Bank,* 8 Rob. (La.) 262; in Mississippi, *Farmers' Bank* v. *Douglass,* 11 Smedes & M. 469; in North Carolina, *Hafner* v. *Irwin,* 23 N. C., (1 Ired.) 490,—in that case a portion of the creditors were excluded from the benefits of the assignment, and yet the court held that it did not fall under the operation of the statute; in Virginia, in *Dance* v. *Seaman,* 11 Grat. 778; and in Florida, *Cotton* v. *County Commissioners,* 6 Fla. 610; in Michigan, *Hollister* v. *Loud,* 2 Mich. 316; in Indiana, *Church* v. *Drummond,* 7 Ind. 17; in Illinois, *Gardner* v. *Commercial Bank,* 95 Ill. 298; in Ohio, *Hoffman* v. *Mackall,* 5 Ohio St. 124, 64 Am. Dec. 635.

The doctrine that a man in failing circumstances, unable to pay his debts, may assign his property for the benefit of all of his creditors, provided he did so in good faith, has become too well established to now be questioned. If, however, a fraudulent intent be proved, or if the terms of the assignment itself show that a fraud has actually been committed, the assignment is in violation of the statute and void.

It is claimed that this conveyance is fraudulent for the reason that it leaves the possession of the property from the

time of the assignment to the time of the sale provided for, in the grantors. This would of itself be fraudulent if personal property were assigned in the conveyance. The rule, however, is different with reference to real estate. Burrill, Assign. §§ 276, 277 and notes and cases cited; Bump. Fraud. Conv. 121, 122 and cases cited. "To hold that the possession of real estate by the vendor is *per se* presumptive evidence of fraud would be in effect to abolish the distinction known and acknowledged between personal and real property, and to lose sight of the different methods of conveying the title to the two kinds of property."

It is contended, further, that the deed is fraudulent on account of an unreasonable delay of the time of the sale. The deed provides that after six months enough of the property shall be sold to pay one-half of the indebtedness, and at the end of twelve months the balance shall be sold. It is the law that the postponement to an unreasonable time of the time of sale will avoid the assignment. If the period be reasonable, however, such a stipulation will be valid. There has been much discussion as to what constituted unreasonable delay to avoid the assignment. The authorities will be found in Burrill, Assign. §§ 214, 215 and cases cited. The overwhelming weight of authority has agreed that less than one year is not unreasonable. While cases may be found holding that a longer term than one year does not invalidate the assignment, yet those cases are based upon peculiar circumstances, and are against the great weight of authority. See Bump. Fraud. Conv. 412 and cases cited.

The assignment before us places the property in the hands of a trustee, to be devoted, so far as this evidence shows, to the payment of all the debts of the grantors, with no evidence of fraud in fact. The court must assume that this conveyance was made in good faith, for the benefit and for the protection of the creditors, rather than for their injury, and the court cannot say that this conveyance is fraudulent as a matter of law.

The judgment of the court below is affirmed.

Porter, J., concurs.

[Civil No. 131. Filed May 31, 1886.]

[S. C. 11 Pac. 119.]

THE WESTERN MINING CO., Plaintiff and Appellant, v. JAMES H. TOOLE et al., Defendants and Respondents.

1. NEGOTIABLE INSTRUMENTS—ORDER BY CORPORATE OFFICER ON DISBURSING OFFICER—NO ACCEPTANCE NECESSARY TO BIND CORPORATION—MAY BE TREATED AS EITHER NOTE OR BILL OF EXCHANGE.—Where an order for the payment of money is drawn by an officer of a corporation having authority to incur indebtedness upon a disbursing officer of the same corporation no acceptance is necessary to bind the corporation. Such an order may be treated by the holder as either a promissory note or bill of exchange.

2. SAME—GENUINENESS—PRINCIPAL AND AGENT—PRINCIPAL BOUND BY ACTS OF AGENT WITHIN SCOPE OF APPARENT AUTHORITY IMPLIED FROM COURSE OF BUSINESS DEALING—MAXIM THAT HE WHO, WITHOUT INTENTIONAL FRAUD, HAS ENABLED A PERSON TO DO AN ACT WHICH MUST BE INJURIOUS TO HIMSELF, OR TO ANOTHER INNOCENT PARTY, SHALL HIMSELF SUFFER THE INJURY, RATHER THAN THE INNOCENT PARTY WHO HAS PLACED CONFIDENCE IN HIM, APPLIED.—In a case where a bank in discounting a draft inquires concerning its validity of the bookkeeper of the corporation upon whom drawn, and the bookkeeper undertakes to say that it is genuine and will be paid when due, and it appears that such bookkeepr has in the ordinary course of business with such bank been accustomed to pass upon the validity of similar drafts, and has every opportunity to determine their validity, and in the absence of the superintendent has paid them, even though such bookkeeper has no express authority to pass upon the validity of the draft, such act is within the apparent scope of his authority as determined by his former course of dealing on behalf of his principal, and his principal will be bound. The maxim of natural justice here applies with its full force, that he who, without intentional fraud, has enabled any person to do an act which must be injurious to himself, or to another innocent party, shall himself suffer the injury, rather than the innocent party who has placed confidence in him.

REHEARING DENIED JANUARY 7, 1887.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Affirmed.

The facts are stated in the opinion.

Stewart & Herrin, Lewis & Dibble, and W. H. Stilwell, for Appellant.

The contract by which the drawee is made liable, whatever its form or whether verbal or written, is called an acceptance. Nothing less than what in law amounts to an acceptance, or a contract to accept, will bind the drawee or estop him from denying his obligation to pay the bill. Bigelow on Estoppel, pages 391 to 418 inclusive.

Under the laws of this Territory no acceptance is binding unless the same is in writing. Compiled laws of Arizona, p. 578.

Under a similar statute in New York it has been held that the drawee could in no case be held on a bill of exchange unless his acceptance was in writing. Vol. 1, Abbott's N. Y. Digest, p. 481, sec. 154; *Luff* v. *Pope,* 5 Hill, 413; *Pike* v. *Irwin,* 1 Sanf. 14; *Duncan* v. *Berlin,* 60 N. Y. 151.

The refusal of Wade to accept the draft, in writing, when requested to do so by Mr. Clapp, the manager of the bank, dishonored the bill. The defendants could not after such refusal become *bona fide* holders. 1 Edwards on Bills and Notes, Sec. 517; 1 Daniels on Negotiable Instruments, p. 593, Sec. 788.

O. O. Trautmer, William Herring and John Haynes, for Respondents.

PORTER, J.—Plaintiff is a corporation, and had a mine at Tombstone, and operated a mill at Contention, about 10 miles distant from its mine. The business at the mine was transacted under the name of "The Western Mining Company," and the business at the mill by the name of the "Contention Mill & Mining Company." Defendants were bankers, who received the deposits of plaintiff, and paid out the same on plaintiff's orders in the ordinary course of business. D. J. Bousfield was in charge of said mill, and transacted the business connected therewith. On the eighth day of August, A. D. 1881, a draft or order,

purporting to be drawn by said Bousfield, in words and figures as follows:

"2,737.50. CONTENTION MILL, August 8, 1881.

"*Contention Mill & Mining Company:* Pay to the order of Charles G. Young, two thousand, seven hundred and thirty-seven and 50-100 dollars, for 365 cords of wood, at 7½, payable September 5, 1881, and charge the same to mill account. D. J. BOUSFIELD.

"*To J. H. White, Esqr., Supt. Contention Mine, Tombstone, A. T.*"

—Was presented to defendants at their banking-house at Tombstone, by one Howard Robinson, at that time in the employment of plaintiff, and defendants were requested by said Robinson to discount the same. It was admitted by plaintiff that said draft was in usual form of drafts drawn by the superintendent of the mill on the superintendent of the mine. J. H. White was said superintendent. Such like drafts had from time to time, in the usual course of business between plaintiff and defendant, been cashed and discounted by defendant, and ratified by plaintiff in its settlement with defendants.

At the time of the presentation of the draft said White was absent from the territory, and Mr. A. P. Wade was the book-keeper for the Contention mine. Mr. M. B. Clapp, the general manager of the bank, testified that on said eighth day of August, 1881, Mr. William B. Murray came into the bank with Mr. Robinson, and introduced him, saying, "This is Mr. Robinson, the book-keeper at the Contention mill;" that at first he declined to discount it, as he only cashed such drafts for regular customers; that afterwards Robinson returned with Mr. Wade. He said to Wade, "This draft is for an unusually large amount," and wished to know if it was all right. Wade replied: "Oh, yes; that is all right. We will pay it on the fifth. I will give you a check now, but I don't wish to run my account low. The mine may need more money, and I do not wish to be obliged to draw a draft on San Francisco." Witness further said to Mr. Wade: "Do you know that this wood is all right?" Witness said: "Do you know the payee? I think it was Young." He said: "Oh, yes; it is all right.

That is Bousfield's signature. Don't you know it? This is all right. This man is one of our employes. I would pay it now, but I am short, and if you cash it for him, make your discount as low as you can." Defendant then cashed the draft. Wade says he told the manager that the signature was Bousfield's, but could not have said it was all right. After the reception of the money, Wade and Robinson counted the money. Several days after Mr. White came into the bank; asked to see what drafts the bank had drawn, from the mill on the mine, which were shown him, and he pronounced the draft in question to be a forgery. The draft on its maturity was presented at the mine, and was not paid. Then the bank charged the amount to the account of the mine.

This action was brought for the sum of $1,641.32, for money had and received; and, by way of counter-claim, defendants set up payment of said draft, and asked for judgment for $1,096.18, over and above the sum sued for, with interest, etc., and obtained judgment for $1,250.97, principal, and interest, etc., on said judgment. The case comes here on appeal from the judgment, and from order denying plaintiff's motion for a new trial.

The first contention of plaintiff is that there was no acceptance of said draft by plaintiff. We do not deem it necessary in this character of case. We adopt the language of brief respondent: "Bousfield was in charge of the mill, and authorized to purchase fuel and other supplies for the use of the mill; and by such sale, and the purchase by Bousfield, the liability of the company was created. The office of the order was merely to inform the corporation of the indebtedness, and what it was incurred for, and to designate the person to whom it was paid. The purchase was made by the corporation through Bousfield as its agent. No liability to parties selling wood accrued against Bousfield, nor was he personally liable as the drawer of the draft or order, his agency being known." *Hicks* v. *Hinde*, 9 Barb. 528. See, also, *Mobly* v. *Clark*, 28 Barb. 390; *Hasey* v. *White Pigeon Beet Sugar Co.*, 1 Doug. (Mich.) 193. The corporation was therefor liable without acceptance.

In *Dennis* v. *Table Mt. Water Co.*, 10 Cal. 370, where the

draft was drawn by the president and secretary upon the treasurer, the court says: "The draft is only an order of the company upon itself, from its head and secretary upon its treasurer, and it is well settled that in such cases no notice of presentation and non-payment is necessary; and where a duly-authorized agent, or officer of an incorporated company, draws in behalf of the company upon the treasurer, cashier, or other officer of the company, who has the custody of, and is charged with the duty of disbursing, the company's funds, this is, in substance, it should seem, a draft by the company upon itself, and may be treated either as a bill of exchange or a promissory note; and it may be laid down as a general rule that whenever it was intended as a bill of exchange, or a promissory note, and it possesses the requisites of each, it may be treated as either, at the option of the holder. 1 Pars. Bills & Notes, 163.

But, say appellants, this argument will not apply, because it is admitted this draft is a forgery. The foregoing is an answer to their argument that an acceptance was necessary to bind the company. The fact of Bousfield's employment, and giving drafts for wood, etc., coupled with the fact that Wade, another employe, informed defendants that the wood was furnished, goes far to show the particularity which defendant required before discounting the draft, and its desire to guard against all contingencies; and as we hold no acceptance was necessary, its genuineness must be inquired into on its being discounted by the bank, and such inquiry was made of him whose business was to examine into their genuineness, and to pay the same. What more could be asked of any one discounting this draft?

The further contention is made by appellants that Wade had no authority thus to bind the company. Let us see. The testimony is that Mr. White opened an account in the name of the Western Mining Company, and did the usual course of business of a mine with this bank; drew drafts on San Francisco; checks to pay their debts; until, a month or two after he opened his account, he notified the bank to honor the signature of Joseph H. White, per A. P. Wade. The manager of the bank testifies, in effect, that Mr. Wade took the place of Mr. White. He drew his checks, and paid the

debts of the company. In relation to accounts of the mill, the manager says: "Mr. Wade would usually come down before pay-day, to see if we had any mill drafts, to look at them, and see if they were all right; and if they were all right, he would say: 'I will bring you in a check for this amount.' On several occasions he would come in, and take up the drafts before they came due, and say: 'I might as well pay you that sum now as to wait till pay-day.' Mr. Wade was the only man we ever saw in connection with these mill drafts. He seemed to be thoroughly posted on them, and careful in taking them, and appeared to be in a position to know whether they were good drafts or not." Under the authority given Wade by White, the latter says: "Wade sometimes paid for the mill supplies. * * * Wade paid some of them, and I paid some of them. I paid most all of them when I was here." Here was Mr. Wade paying and examining the mill accounts, in a position to be cognizant of all the indebtedness of the mill, and, according to the testimony of the bank manager, "was in a position to know whether these drafts were good or not. * * * Was in the habit of coming in and examining them, and passing upon their correctness, and if he did not know anything about what the drafts were given for, he would telephone to the mill. He had a telephone communication with the mill, and had ample opportunities of ascertaining their genuineness."

"When the agent acts beyond, or even in direct opposition, to his express authority, but within the scope of his implied authority,—that is, within the apparent authority conferred upon him, or appearing from a prior course of dealing with or on behalf of his principal, or from any other mode of his being held out to the world as appearing to possess the authority,—and the principal is personally innocent of any fraud, the principal cannot acquire and retain any benefit obtained, under such circumstances, from the fraud, representations, or concealments." 2 Pom. Eq. Jur. 399. Wade was not guilty of any designated fraud, but his representations of the genuineness of Bousfield's signature was the injury inflicted upon the bank, and his principal must therefore be answerable. His apparent con-

trol over the business of paying these drafts,—of means of knowledge of their correctness; the sanction of the signature,—would make it a great injustice to set up a more narrow limit to his authority. "The maxim of natural justice here applies with its full force, that he who, without intentional fraud, has enabled any person to do an act which must be injurious to himself, or to another innocent party, shall himself suffer the injury, rather than the innocent party who has placed confidence in him. The maxim is founded in the soundest ethics, and is enforced to a large extent by courts of equity." Field, Corp. 193; Story, Ag. 152.

The judgment and the order denying motion for new trial are affirmed.

Shields, C. J., and Barnes, J., concurred.

[Civil No. 164. Filed May 31, 1886.]

[S. C. sub nom. *Burter* v. *County of Pima*, 11 Pac. 62.]

GEORGE W. BARTER, Plaintiff and Respondent, v. THE COUNTY OF PIMA, Defendant and Appellant.

1. APPEAL AND ERROR—SUBSTANTIAL CONFLICT IN EVIDENCE.—Where there is a substantial conflict in the evidence the judgment of the trial court will not be reversed on the ground that the evidence does not warrant it.

APPEAL from a judgment of the County Court in and for the County of Pima. Affirmed.

Hereford & Lovell, for Appellant.

Hoover, King & Satterwhite, and Haynes & Styles, for Respondent.

PORTER, J.—The cause was tried by the court without intervention of a jury. Judgment was rendered for the plaintiff. From the judgment, and from an order denying motion

for new trial, defendant appealed. The evidence as to value of the services for printing the delinquent list, for which this action was brought, varied very materially. It was the province of the judge to determine the value; and it is well established that where there is a substantial conflict the judgment will not be reversed on the ground that the evidence does not warrant it. *Passim.*

Judgment and order denying motion for new trial affirmed.

Shields, C. J., and Barnes, J., concur.

[Civil No. 150. Filed May 31, 1886.]

[S. C. 11 Pac. 61.]

RICHARD WOFFENDEN, Plaintiff and Appellant, v. PEDRO CHAROULEAU et al., Defendants and Respondents.

1. COURTS—HAVE POWER TO RENDER DECISIONS AND ENTER JUDGMENTS IN VACATION—STATUTES CITED—§ 146 § 637, CHAPT. 48 COMPILED LAWS 1877—RULE 37 SUPREME COURT, PROMULGATED IN 1879, APPROVED.—The court has power to render a decision, and cause a judgment to be entered, and file its reasons therefor, in vacation, in a cause which has been regularly heard and submitted to the court in the term, and taken under advisement. Statutes *supra* cited. Rule 37 of Supreme Court consistent with the laws of territory and acts of Congress.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima.

Motion to docket cause. Denied.

F. W. Gregg and H. R. Jeffords, for Appellant.

Farley & Franklin, and Alex. Campbell, for Respondents.

BARNES, J.—This cause was submitted to this court at the January term, A. D., 1885, in September. During the vaca-

tion of this court an opinion was filed and judgment entered affirming the judgment. Appellant now moves this court to docket the cause, and set the same down for hearing, on the ground that the cause is still pending and undecided, as the court has no power to enter judgment in vacation.

Chapter 48 of the Compiled Laws is the procedure act in civil cases governing the supreme as well as the district and other courts. Section 146 of that act provides that "a judgment is the final determination of the rights of the parties in the action or proceeding, and may be entered in term or vacation." This law is broad enough to include all courts, and all judgments. Section 637 of the same chapter provides that the supreme court make rules not inconsistent with the laws of the territory for its own government, etc. Rule 37 of the supreme court provides that cases argued and submitted in the term may be decided, and the decision and judgment be rendered, in vacation. This rule was promulgated in 1879, and has remained in force ever since, and has been acted upon and acquiesced in until now. We do not think this rule to be inconsistent with the laws of the territory or the acts of congress. The court has power to render a decision, and cause judgment to be entered, and file its reasons therefor, in vacation, in a cause which has been regularly heard and submitted to the court in the term, and taken under advisement. Whatever the mere form of the entries may be, that is what *action* under said rule amounts to. *People* v. *Jones*, 20 Cal. 50.

The motion is denied.

Porter, J., concurs.

SHIELDS, C. J.—I do not think section 146 of chapter 48, cited by my Brother Barnes, has reference to a judgment of the supreme court. It has application solely to district courts. But section 637, cited, confers authority on the supreme court to declare by rule that decision and judgment may be rendered in vacation. In the exercise of such authority, rule 37 was long ago adopted, and must be regarded as right and correct until abrogated or changed. I therefore concur in the above opinion, but, in so doing, I cannot help

expressing my disapproval of the rule. In my opinion, cases should be heard and determined in term.

[Civil No. 149½. Filed May 31, 1886.]

[S. C. 11 Pac. 117.]

RICHARD WOFFENDEN, Plaintiff and Appellant, v. JEAN PIERRE CHAROULEAU et al., Defendants and Respondents.

1. HUSBAND AND WIFE—SEPARATE ESTATE—WIFE HAS RIGHT TO CONVEY OR LEASE—RENTS AND PROFITS ARE SEPARATE ESTATE—"MARRIED WOMAN'S ACT" OF 1871 CONSTRUED (par. 2000 p. 332, Comp. Laws 1877)—MILLER v. FISHER, 1 ARIZ. 232, 25 Pac. 651, CHAROULEAU v. WOFFENDEN, 1 ARIZ. 346, 25 Pac. 662, CITED AND APPROVED—STARE DECISIS—WOFFENDEN v. CHAROULEAU, ANTE—, 8 Pac. 302, REVIEWED AND DISAPPROVED IN PART.—Under "Married Woman's Act" of 1871, a married woman may convey or lease her separate real estate, and may enforce such lease by collecting rents, and the rents so collected are her separate property. Cases, *supra*, reviewed and approved. Where opinions of this court have stood for more than ten years and have become a settled rule of property upon the faith of which rights have become established, and to overrule them would work confusion, rule of *stare decisis* should be invoked. Woffenden v. Charouleau, *ante*, p. 44, 8 Pac. 302, reviewed, and, so far as question of ownership of rents and profits is discussed, held *obiter dicta*, and disapproved.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Affirmed.

The facts are stated in the opinion.

F. W. Gregg and H. R. Jeffords, for Appellant.

Farley & Franklin, and Alex. Campbell, for Respondents.

BARNES, J.—This was an action by the plaintiff against Anna C. Woffenden, his divorced wife, and her co-defend-

ant, in which he seeks to require her to account to him for the rents and profits of her separate real estate during coverture, and asking, also, that he be declared to be the owner of the undivided one-half of the real estate conveyed by her during coverture to her co-defendant. The plaintiff on the trial offered to prove that all the lands mentioned in the complaint were purchased during coverture, by her from the rents, issues, and profits which accrued during coverture, of her separate estate. The court held that the testimony of this witness was irrelevant, and refused to admit the same.

This raises again squarely before this court the question whether the act of 1871, commonly called the "Married Woman's Act," makes the rents, issues, and profits, during coverture, of the separate real estate of a married woman, her separate estate. The case of *Miller* v. *Fisher,* 1 Ariz. 232, 25 Pac. 651 (decided at the January term, 1875,) is the first case in this court where that act was before the court for construction. That was a suit to enforce a verbal contract of sale by a married woman of certain personal property. The court held that, by virtue of the act of 1871 aforesaid, she was capable of making a valid contract of sale of her separate property. In argument the case goes further than this, but to this extent we reaffirm the decision. The force of this decision leads to the conclusion that she may lease her separate real estate. If she may make a vaid contract of lease, she may enforce it by collecting rents, and the rents so collected are her separate property. This question came squarely before the court at the January term, 1876, in the case of *Charauleau* v. *Woffenden,* 1 Ariz. 243, 25 Pac. 652, and was considered with great care, and it was decided that the rents and profits of the separate estate of a married woman accruing during coverture are her separate estate; and, if she invests such rents and profits in other real property, it is her separate estate. The case seems to have been argued with great ability, and the decision is the mature judgment of this court. In the same term of court, in another case, (*Woffenden* v. *Charauleau,* 1 Ariz. 346, 25 Pac. 662) the same question was again considered, and again this court decided that

the rents and profits of the separate estate of a married woman accruing during coverture are as absolutely hers as the property of which they are the fruits.

These cases have now for over 10 years stood as the construction of the act of 1871 by the highest tribunal of this territory, and have become a rule of property. Contracts have been entered into, property bought and sold, real estate acquired, and valuable and lasting improvements made, on the faith of these decisions; and to overrule them now would work great confusion to property rights established upon the law as laid down in these cases. If the doctrine of *stare decisis* might ever be invoked, we think that this is the case. It is true that in an opinion filed October 18, 1885, (*Woffenden* v. *Charouleau,* Ante p. 44, 8 Pac. 302,) the doctrine of these cases was questioned by this court. The court below decided that rents and profits were separate estate, and that property purchased therewith was separate estate. This ruling the court questioned, but affirmed the judgment on the ground that the defendant was a *bona fide* purchaser of the real estate sued for. So far as the opinion in that case discusses the question as to the ownership of the rents and profits, and of the property purchased therewith, as between the husband and wife, it is purely *obiter dicta,* and is no part of the question decided, which was that the defendant obtained a good title from the wife, and affirmed the judgment of the court below. We do not concur with that portion of the opinion in that case. It is time this vexed question were laid at rest.

The judgment of the court below is affirmed.

Shields, C. J., and Porter, J., concur.

[Civil No. 159. Filed June 1, 1886.]

[S. C. 11 Pac. 110.]

WASHINGTON M. JACOBS, Plaintiff and Respondent, v. J. M. GEORGE et al., Defendants and Appellants.

1. PRINCIPAL AND AGENT—AGENT CONTRACTING WITH RESPECT TO

MATTER OF AGENCY FOR INDIVIDUAL BENEFIT—ACTING AS AGENT FOR BOTH PARTIES—WHERE CONTRACT IS ENTERED INTO FOR FRAUDULENT PURPOSE EQUITY WILL REFUSE ALL PARTIES AFFIRMATIVE RELIEF.—Where an agent for the sale of a mine makes a contract with respect thereto for his individual benefit, and further attempts to represent both parties to the transaction, in an action to enforce such contract a court of equity will refuse relief and will leave the parties in the position in which it finds them.

OPINION ON SECOND APPEAL, 3 Ariz., 20 Pac. 183.

APPEAL from a judgment of the County Court in and for the County of Pima. Reversed.

The facts are stated in the opinion.

Hoover & Satterwhite, for Appellants.

Haynes & Styles, for Respondent.

PORTER, J.—The plaintiff was an assayer in Tucson, and one of defendants, Morgan, was a mining agent, residing in the same town. Morgan was at Jacobs' assay office, and met there one Manual Sanchez, who had specimens of ore. Sanchez could not talk English very well, and Jacobs acted as interpreter. Sanchez wanted Morgan to buy the mine. Thereafter Jacobs represented to him the richness of the mine, and desired to sell it to Morgan. He (Morgan) had the ores tested by defendant Hiertz, and then wrote to defendant George, and then they all agreed to purchase the San Recardo mine if satisfactory. Accordingly Morgan and Jacobs, on May 8, 1883, entered into a written agreement in which Morgan was to examine the mine, and, if it suited, was first to take a bond, and thereafter, on further testing the ores, agreed to purchase the same for $5,000, payable in installments therein mentioned; and said Jacobs, on his part, stipulated as follows: "I agree to use by best endeavors to secure the property above described upon the terms specified." Defendants' Exhibit A. Jacobs said, "If you people buy it for that, I want to have a quarter of it;" and further, "I will send for him, (Sanchez.) Don't tell him of the quarter I want of the mine." These remarks of

Jacobs were testified to by Morgan, and nowhere in the transcript were they denied.

On the tenth of May, plaintiff's Exhibit D was made, whereby Manual Sanchez and W. M. Jacobs, of the first part, agreed to sell to parties of the second part, J. M. George, J. J. Hiertz and J. S. Morgan, the St. Richard mine, formerly known as the "Santa Christo Mine," in the state of Sonora, Mexico, for $5,000, in installments therein set forth; and the parties of the second part agreed to make the specified payments, and to pay all expenses in going to Sonora and returning, "whether the property shall be found satisfactory or not." George and Hiertz then went to the mine with Sanchez and came back satisfied. The final contract of sale was executed by Sanchez and his associates in Mexico.

On May 10, 1883, Exhibit C of plaintiff was made, in which George, Hiertz and Morgan, parties of the first part, agreed with Jacobs, of the second part, that in case the purchase was consummated they would deed to him, "as commission for the sale and purchase of the mine, one-quarter of it;" and further: "The party of the second part agrees, for and in consideration of said one-quarter of said mine, to give to the party of the first part the refusal and first option to purchase said one-quarter of said mine whenever the said party of the second part shall conclude to bargain for or sell his said quarter of said mine. It is also further agreed by each of the parties herein named that either the party of the first part, or the party of the second part, shall have the right to erect and establish such reduction works upon or near said mine as they may deem fit, at their own expense, and develop said mine in such manner as in their judgment may seem to them best for their individual interest, without interference or hinderance by the other party of the second part. It is further agreed that the parties of the first part are to have and receive all the profits arising from the development of said mine, and the reduction of ores they may take from said property, until the party of the second shall have disposed of said one-quarter of said mine."

About November 24, 1883, the purchase was completed by the conveyance from Sanchez to the grantees. Subsequently to said purchase said grantees sold the three-fourths of the

mine to the Recardo Mining Company, a company organized and acting under the laws of the territory of Arizona, of which organization the individual defendants form a part. About the time of the last payment Sanchez notified individual defendants that he claimed a one-quarter interest which they had agreed to deed to plaintiff; and on the twenty-fourth of November, 1883, the defendants paid Sanchez $1,250 for said interest, and took a deed therefor.

Plaintiff alleges in his complaint "that the denouncement and other legal documents pertaining to the title of the mine were in the name and in the possession of Manual Sanchez," and at the same time plaintiff had from said Sanchez lawful authority to sell said mining location for the sum of $3,000, and was endeavoring to sell said mining claim for the benefit of himself and said Sanchez. This allegation is founded upon two instruments in writing, the first of which is alleged to have been made October 11, 1881, whereby Sanchez covenants to make over to plaintiff, the assayer, the third part in some, and the fourth part in others, which he possessed, or might thereafter possess, either alone or in company with others; the consideration thereof being for assaying the ores of the mines, without further compensation; each party binding himself to act in accordance with the laws of the country where the mines are situated. Sanchez was an ignorant man, and could neither read nor write. His mark is attached thereto, the name of Jacobs signed, and witnesses were J. M. Silva and H. N. Smith. The trial judge, on inspection of the document, declared all of it to be a tracing, except the signatures Jacobs and Smith. The plaintiff wavers and is uncertain as to whether the contract was signed in ink or in pencil. Neither does the witness Smith remember whether it was in pencil or in ink. It was certainly traced. Then comes another contract between plaintiff and Sanchez, (plaintiff's Exhibit B,) under date of twenty-sixth of January, 1883, which plaintiff found necessary to have in order to effectuate the contemplated sale. In this document authority was given Jacobs, who was recognized therein as a "partner," to sell, contract or bond certain mines for sums specified therein, among which is the one in question, which was to be sold for $3,000; and

therein it is stated that one-quarter thereof belonged to Jacobs. Plaintiff says he saw Sanchez sign it. When asked, "Was there others present at the time?" he answered, "My wife wrote it at my dictation." It shows signature by mark, with witnesses Mark Tully and Frank R. Bettis.

Passing by the due execution of said instruments, and whether or not valid by the laws of Mexico where there is an executory contract performed on one side, we will view their effect upon this transaction. Says plaintiff: "Having such a contract in my possession, and having arrived from Sonora with ores, I went into Mr. Morgan's office, and he commenced talking to me about taking third parties going down. I told him: 'You may believe what you please; but here are the assays I have made; and, if you don't believe that I have made them, right there is Mr. Hiertz, who is an assayer. I will give him the use of my office,' etc. I told them that they should give five thousand dollars for the mine, and that they should give me one-fourth interest for commission. After they agreed to that, they wanted a little further proposition. They wanted to have me use my influence with Sanchez to take the money in installments. I said: 'I suppose if you will pay one thousand dollars in cash, and the rest in installments, he will be agreeable.' So they drew that agreement in pencil, and I signed it, and George signed it, and Morgan signed; then put the document in their desk, and promised to give me a copy of it next day, but they never gave it to me before the day following."

It seems that a more formal document was contemplated, which, being made, plaintiff was not satisfied with, and held onto this one. Defendants insist that there was no delivery, as another one was to be the governing agreement; but we think this was sufficient delivery of their contract with Jacobs, and will take it as being valid under the laws of Mexico. If Jacobs was their agent, and performed their service, and acted in good faith, that is all that was required of him under their contract with him.

The individual defendants, while recognizing Jacobs as agent of Sanchez, yet use him as their own agent, and so declare in their testimony. They say that Jacobs represented himself as agent of Sanchez. This Jacobs denies on re-exam-

ination; and yet on his cross-examination he says, "having possessed himself of the contract, which contract was authority from Sanchez to sell, I went into Morgan's office;" and there they commenced the negotiations. But we will concede explicit denial, and no review therefor to be had on the verbal contradictions. The payment of the $5,000 is made, and Jacobs gets one-fourth of the same, claiming by virtue of his agreement with Sanchez that he was the equitable owner of one-fourth; and yet he, after mature deliberation, signs a receipt to Sanchez, reciting that this one-fourth was commission for selling the mine. From his own stand-point, he, in effect, sells three-fourths of the mine, and keeps his own interest restricted only by giving grantees the refusal to purchase. It is true, Sanchez gets more money than the power called for, but it is equally true that plaintiff received his part of the enhanced price aside from the one-quarter to be deeded back to him. He is reaping a rich harvest.

"It is well settled, and a salutary rule, that 'a person who undertakes to act for another in any matter shall not, in the same matter, act for himself. It is only by a rigid adherence to this simple rule that all temptations can be removed from one acting in a fiduciary capacity to abuse his trust, or seek his own advantage in the position which it affords him. One consequence of a violation of the rule is that the agent must, at the option of his principal, account to him for any profit he may have made by the transaction. It matters not how fair the conduct of the agent may have been in the particular case, nor that the principal would have been no better off if the agent had strictly executed his power, nor that the principal was not in fact injured by the intervention of the agent for his own benefit. If the agent deals with the subject-matter of his agency, or, by departing from the instructions of his principal, obtains a better result than could have been obtained by following them, the principal can claim the advantage thus obtained, even though the agent may have contributed his own funds or responsibility in producing the result. The rule which places it beyond the power of the agent to profit by such transactions is founded upon considerations of policy, and is intended, not merely to afford a remedy for discovered frauds, but to reach those which

may be conceded; and also to prevent them, by removing from agents and trustees all inducements to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates." *Dutton* v. *Willner*, 52 N. Y. 312, and cases therein cited.

Well, suppose that the plaintiff was acting as agent for these defendants, in that case it was his bounden duty to purchase this property at the least possible price. Did he do it? The plaintiff says the consideration which induced the second paper, viz., Exhibit B, was that Sanchez was going to let the property go for $1,000: saying: "I refused to let him throw away his property in that way, and I told him I would find a party to go down and look after them." This paper itself fixed the price of this property at $3,000. He knew Sanchez would sell for that sum, and yet he made these defendants believe he could not obtain it for less than $5,000. The conduct of these individual defendants is most reprehensible. They meet this plaintiff, who, they say, was Sanchez's agent, and by this secret agreement with him obtain the purchase of the property represented, as they say, by plaintiff to be worth $10,000 for $5,000. They in fact employ this man, the agent, friend and interpreter of Sanchez, to get the property as low as possible. The defendant Morgan testified: "He (Jacobs) soon told me that he was acting for Sanchez in making a sale of this mine, and that he would get a quarter of what Sanchez got for it for selling it." This was in January, 1883. The transaction for sale occurred in May. The other defendants say they did not know of Morgan getting part of the money until the second payment was made. It may be that Morgan did not inform his co-purchasers of that fact, which caused them to so testify.

"If a contract has been entered into through fraud, or to accomplish any fraudulent purpose, a court of equity will not, at the suit of one of the fraudulent parties,—*a particeps doli*,— while the agreement is still executory, either compel its execution or decree its cancellation; nor, after it has been executed, set aside, and thus restore the plaintiff to the property or other interests which he had fraudulently transferred. Equity will leave such parties in exactly the position

in which they have placed themselves, refusing all *affirmative* aid to either of the fraudulent participants. The only equitable remedies which they can obtain are purely defensive; and, generally, where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all of the results of the fraud are in the hands of one of the party, a court of equity will not interfere on behalf of the others to aid them in obtaining their share, but will leave the parties in the position where they have placed themselves." 1 Pom. Eq. Jur. 436.

The judgment of the district court is that the individual defendants execute and deliver to the plaintiff a conveyance in proper form to enable him to record the same in the state of Sonora, Mexico, of an individual one-fourth interest of the San Recardo mine; and, in case of their inability to do so, that the other defendants, San Recardo Mining Company," shall execute it. This is to be done without limitation or restriction, whereas it is expressed in the agreement, which agreement is one of the findings of fact, that defendants should have refusal to purchase the one-quarter interest of plaintiff. There would be the record by which plaintiff could sell to any other party without restriction.

We think the court erred in giving judgment for plaintiff. Judgment reversed and a new trial granted.

Shields, C. J., and Barnes, J., concurred.

[Civil No. 136. Filed June 1, 1886.]

[S. C. 11 Pac. 108.]

J. E. SOLOMON, Plaintiff and Respondent, v. J. H. NORTON, Defendant and Appellant.

1. VENUE—APPEAL AND ERROR—CHANGE OF VENUE UPON CREATION OF NEW COUNTY—APPEARANCE WITHOUT OBJECTION WAIVES QUESTION AS TO WHETHER CHANGE WAS AUTHORIZED—LAWS 1881, p. 156, *cited.*—Where an act, *supra*, provides for the creation of a new

county, and further provides that causes may be removed from the court wherein pending to the court in such new county, it is too late for party to object upon appeal to an order transferring the cause, he having appeared in such latter court without objection.

2. CONTINUANCE—GRANTING MATTER OF DISCRETION—NEW TRIAL—SURPRISE UNDER COMP. LAWS 1877, p. 438, par. 2631, subd. 3—SHOWING OF DILIGENCE INSUFFICIENT TO JUSTIFY INTERFERENCE WITH DISCRETIONARY RULING OF TRIAL COURT.—Where a motion for new trial is made on the ground of surprise, under the statute, *supra*, and for failure to grant a continuance and it appears that the cause has been pending for a great length of time, and that no written application for continuance was made, and that there was no showing as to diligence and cause of absence of one defendant, as well as an unsatisfactory showing as to the sickness of the other the court will decline to interfere with the exercise of discretion by the district court in refusing to continue the cause or grant a new trial therein.

3. FINDINGS OF FACT—COMP. LAWS 1877, p. 436, par. 2618, CITED—PRACTICE—MANNER OF RAISING OBJECTION FOR INSUFFICIENCY—MUST BE RAISED BELOW—REVIEWED AND HELD SUFFICIENT.—Where there is an objection that there are no findings of fact in compliance with the statute, *supra*, and it appears that there are meager findings, and the record shows that the objection was not raised on motion for new trial or otherwise below, nor was the judge asked to make them more complete, the findings filed are sufficient, and authorities to the point that there must be findings have no application.

4. JUDGMENT—PRESUMPTION IN FAVOR OF REGULARITY—WHERE RECORD IS NOT CERTIFIED TO AS COMPLETE AN OBJECTION THAT CAUSE WAS NOT AT ISSUE WILL BE DISREGARDED THOUGH THE TRANSCRIPT BE SILENT AS TO WHETHER ANSWER OR PLEA WAS EVER FILED.—Where it is urged that the judgment is erroneous because no plea or answer was ever filed, and the transcript is silent upon the question but is not certified to as being completed, the presumption in favor of the regularity of the judgment will induce the court to disregard the objection.

Porter, J., dissenting, upon the question of abuse of discretion in the district judge not granting the continuance.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Graham. Affirmed.

The facts are stated in the opinion.

Haynes & Styles, for Appellants.

The statute in regard to removals was entirely ignored, and the case was ordered transferred on the *ex parte* oral motion of plaintiff without the knowledge or consent of defendants or their attorneys. The transfer of a cause must be made in the manner prescribed by the statute; Wells on Jurisdiction, Sec. 126; failing to comply with the statute no jurisdiction passes.

The defendants did not waive the point of want of jurisdiction, by failing to make objection to proceeding. "Nothing but an actual removal in accordance with the statute can impair an already attached jurisdiction." Wells on Jurisdiction, Sec. 126.

The case was tried by the Court without a jury, and the court was required to find and state the facts and the law separately. Compiled Laws, Chap. 48, Sec. 182. There being no findings of fact to sustain the judgment, the judgment was erroneous and should be reversed. *Dowd* v. *Clarke,* 51 Cal. 262; *Speegle* v. *Leese,* 51 Cal. 415; *Watson* v. *Cornell,* 52 Cal. 91; *Thompson* v. *Corpstein,* 52 Cal. 653; *Billings* v. *Everett,* 52 Cal. 661; *Kennedy* v. *Berry,* 52 Cal. 87; *Swift* v. *Canavan,* 52 Cal. 417; *Baggs* v. *Smith,* 53 Cal. 417; *Dilla* v. *Bohall,* 53 Cal. 709; *Taylor* v. *Reynolds,* 53 Cal. 687.

J. A. Zabriskie, and J. A. Anderson, F. H. Hereford and Miles Vance McCune, for Respondents.

The order for removal will be presumed to have been made on a proper showing. No answer had been filed by the defendants in four years. The plaintiff was clearly entitled to judgment when the case was called up; and the defendants had no right to a continuance, there was no issue to which the evidence could be material that they proposed to produce at the next term.

There being no issue joined it was unnecessary to make any finding of facts. *Taylor* v. *Palmer,* 31 Cal. 240; *Swift* v. *Maygridge,* 8 Cal. 445.

SHIELDS, C. J.—This suit was commenced before a justice of the peace of the town of Seaford, Pima county, in 1879, and judgment rendered, by default, November 15, 1879, for the sum of $295. The cause was thereafter regularly appealed by defendants to the district court of Pima county. In 1881 an act was passed by the territorial legislature creating the county of Graham out of portions of the counties of Pima and Apache. By this act all actions, of whatever kind or nature, pending in the district and probate courts in Pima or Apache counties, where the subject-matter or property in controversy is situated within the new county of Graham, shall be transferred to the proper court of said county for trial, after the same shall have been established, and it is hereby made the duty of the respective clerks of the counties of Pima and Apache, immediately upon the appointment and qualification of the district and probate courts of said county of Graham, to transmit to the clerks of the corresponding courts in the county of Graham all papers and pleadings in said actions, together with a complete certified copy of all the entries relating thereto appearing upon the records of their respective courts, when the title to real estate is involved; and in all actions pending in said respective courts in the counties of Pima and Apache wherein one of the parties is a resident of the county of Graham, where both parties consent thereto, the same shall be transferred to Graham county for trial. Laws 1881, p. 156.

Under this act the district court of Pima county, on the application of the plaintiff, and on the sixth day of October, 1883, ordered the cause to be sent to the district court of the county of Graham for trial.

The defendants and appellants insist that this order was unauthorized, because on the oral application of the plaintiff, and without their knowledge. This is the first ground of error alleged. It is unnecessary now to decide whether these objections, where a party is entitled to insist upon them, should prevail or not. There is abundant in the record to show that these defendants consented to the transfer from Pima to Graham. There was no objection made in either county to the transfer. Upon the contrary, the record discloses the fact that the defendants appeared in the district

court for Graham county, and asked for a continuance of the cause, but there is nothing to show that they hinted even that the case was not regularly and properly for trial in Graham county.

The district court, in the findings of fact filed, recites that "the cause came on regularly for trial the twelfth day of November, A. D., 1883, before the court without a jury, having been duly waived by the respective parties; Hereford & Zabriskie appearing as attorneys for plaintiff, and S. M. Franklin for defendants." In the motion for a new trial that was made by the defendants immediately after the rendition of judgment against them, the point is not made or raised that the district court of Graham county did not have jurisdiction. From the foregoing facts it is too plain to admit of doubt that the defendants not only made no objection to the trial of the cause in Graham county, but consented thereto. Under such circumstances, they cannot now at this time be permitted to say that the transfer of the cause to Graham county was unauthorized. *Truesdail* v. *Ward,* 24 Mich. 117; *Cook* v. *Perry,* 43 Mich. 623; 5 N. W. 1054; *Berresford* v. *Gedes,* L. R. 2 C. P. 285; 1 Burrill, Pr. 69-71.

The next point urged for error is that the district court was guilty of an abuse of discretion in not continuing the cause. If we were satisfied that such was the fact, we should not hesitate to order a new trial; but courts of last resort should be very careful in setting aside a judgment for this cause. It is urged by the eminent counsel who now look after the case in this court for the defendants that under paragraph 3, c. 48, § 195, Comp. Laws, the district court should have granted a new trial. This is the provision of the Compiled Laws with reference to new trials; and in the paragraph cited it is provided that a new trial may be granted for "accident or surprise which ordinary prudence could not have guarded against." The facts upon which the application in this regard was founded, as stated in the affidavit of Mr. Franklin, at that time the attorneys for the defendants, were that the defendants were not aware that the cause had been set for trial; that one of the defendants was sick, and that the other was in attendance on a grand jury in Cochise county. The reason that the defendants were not aware

when the cause was set for trial is stated in the affidavit of Mr. Franklin to be that he was called away from court in Graham county on business elsewhere, and in his absence the cause was set for trial. These were the facts upon which the court below was asked to grant a new trial on the ground of accident or surprise which ordinary prudence could not have guarded against, and upon which we are asked to say that the refusal of the district court to grant the new trial asked was an abuse of discretion. We do not think we should interfere. The great length of time that the cause has been pending, the fact that no written application for a continuance was made, the entire absence of any showing whatever as to diligence and the cause of absence of one of the defendants, as well as the unsatisfactory showing as to the sickness of the other, induce us to decline to interfere with the exercise of discretion by the district court in refusing to continue the cause or grant a new trial therein.

The next ground of error alleged is that there were no findings of fact filed by the court below in accordance with Comp. Laws, *c.* 48, § 182. But there certainly was a finding of fact. It may not be very full or complete, but the nature of the case hardly required that it should be. The district court certainly undertook and supposed it had complied with this statute, and found both the facts and conclusions of law separately. Neither in the motion for new trial nor otherwise was the point now made raised, or the judge asked to make his findings of fact more complete. The court in its findings, after reciting the submission of the cause on the appearance of the parties by their respective attorneys, and the waiving of trial by jury, then states, "and from the evidence introduced the court finds the facts as follows, to-wit." Then follows a brief statement of the facts, and then the findings conclude as follows: "And as a conclusion of law from the foregoing facts the court finds that plaintiff is entitled to judgment for the sum of $422.25, and costs of suit, and that judgment be entered accordingly." The authorities cited by the learned counsel for defendants, to the effect that there must be a finding of facts have no application here; for in this case there was a finding of facts, as the foregoing shows. *Douglass* v. *State,* 43 Wis. 395.

Only one thing further is discussed in the brief, and a word will suffice for that. It is said that the judgment is erroneous because no plea or answer was ever filed by the defendant. This reference in the brief seems to be the first time that this point was ever raised, although the suit has been pending eight years and more. The transcript is silent on the question of whether any plea or answer was filed by defendants, but it does not assume to set out the entire record and proceeding. The certificate of the clerk of Pima county is that the papers furnished by him were copies "of all the orders and proceedings had and noted in said court;" and then he proceeds to state why he cannot give a correct transcript of the cause. The certificate of the clerk of Graham county simply recites that the copies of papers attached to the certificate were copies of the original papers on file, but does not certify that they are all of the papers on file. Under such circumstances, the presumption in favor of the regularity of the judgment would induce us to disregard the objection now made. Besides, both parties, in all the proceedings had in the case for all these years, have treated the cause as properly at issue and ready for trial. There is nothing in this objection.

The judgment is affirmed.

Barnes, J., concurring.

PORTER, J.—(dissenting.) I dissent from the opinion of the majority of the court, for the reason that defendants did not have a fair chance for the presentation of their case to the court; that there was an abuse of discretion in the district judge in not granting the continuance. It appears that the cause was placed on the calendar Saturday, the tenth day of November, 1883; that the attorney for defendant was called away by important business, but returned on Monday, the 12th, in time for session of the court; that on inquiry that morning, plaintiff's attorney told him the cause had not been set for trial; that on or about 3 o'clock P. M. of said day the cause was called by the court for trial; that the court was informed of foregoing facts; that there is no record upon the minutes of the court showing that said

cause was set for trial till nineteenth of said month. The court amended the minutes of the tenth of November, *nunc pro tunc*, as follows: "That this cause be set for trial November 12, 1883, the clerk having omitted to make the entry on the minutes; and, further, it appeared on the motion for continuance (a written motion and affidavit being waived by attorneys for plaintiff, as stated in the attorneys' affidavit) that J. H. Norton and M. W. Stewart were absent witnesses,—the former being sick and the latter in attendance on the grand jury in another county, by whom it was expected to prove that there was no contract for delivery of barley by plaintiff to defendant, or either of them, as claimed in plaintiff's complaint, or otherwise."

These facts constrain me to say there was evidently an abuse of discretion, and therefore I cannot concur.

[Civil No. 158. Filed June 1, 1886.]

[S. C. 11 Pac. 114.]

M. MOONEY, Plaintiff and Respondent, v. N. M. BROADWAY, Defendant and Appellant.

1. SHERIFFS—ACTION AGAINST—FOR ABANDONMENT OF LEVY—PLEADING—EVIDENCE.—Pleadings and evidence in action against sheriff for abandonment of levy of attachment whereby plaintiff lost collection of judgment reviewed.

2. SAME—ATTACHMENT—RIGHTS OF ATTACHING CREDITORS IN MORTGAGED CHATTELS—STATUTES CITED—COMP. LAWS 1877, c. 82, § 4, p. 615—SAME c. 82, par. 3648, § 5, p. 615—RIGHT OF CREDITOR TO EXERCISE OPTION AS TO PAYING MORTGAGEE OR LEVYING ON EQUITY OF REDEMPTION—OFFICER CANNOT COMPEL HIM TO TAKE ONE COURSE TO EXCLUSION OF OTHER—DUTY OF SHERIFF TO MAKE WRIT EFFECTIVE WITHOUT SPECIAL INSTRUCTIONS.—Where there has been no foreclosure, the creditor has under statutes, *supra*, the option either to seize the entire property covered by the mortgage, paying the amount due thereon, or to levy simply on the right or equity of redemption. This option is for the benefit of the creditor, and to be exercised as he may deem to his interest. The officer should not be permitted to compel him to take one course to the exclusion of the other, and so destroy the option the statute allows him.

It is the sheriff's duty, aside from any special instructions, to make effective the writ placed in his hands, and which he undertakes to execute.

3. CHATTEL MORTGAGE—TITLE REMAINS IN MORTGAGOR UNTIL FORECLOSURE.—A chattel mortgage in this territory is a security merely, and until foreclosure, or some act tantamount thereto, the title to the property mortgaged remains in the mortgagor.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Affirmed.

The facts are stated in the opinion.

H. N. Alexander, for Appellant.

Zent, the mortgagor, had no such interest in the property as might be seized under a writ of attachment. "By a mortgage of chattels the whole legal title of the property passes to the mortgagee conditionally, and to defeat such title the mortgagor, or those claiming under him, must show a performance of the condition. Upon its breach, the title is absolute in the mortgagee, as the general owner, and cannot be questioned in a court of law." *Tannahill* v. *Tuttle,* 3 Mich. 104, 59 Am. Dec. 480, notes; *Heyland* v. *Badger,* 35 Cal. 410-411; *Galen* v. *Brown,* 22 N. Y. 39; *Frankhouser* v. *Elliott,* 22 Kan. 127, 31 Am. Rep. 177; Wait's Actions and Defenses, Vol. 2, pp. 184, 185, 188, 189, 190, 195; Boone on Mortgages, pp. 363, 364, 365; Jones on Chattel Mortgages, Secs. 426, 430, 432, 433, 446; *Burdick* v. *McVanner,* 2 Denio, 170; *Wilson* v. *Brannan,* 27 Cal. 269; *Hulsen* v. *Walter,* 34 How. Pr. 485; *Smith* v. *Acker,* 23 Wend. 655; *Fuller* v. *Acker,* 1 Hill, 473.

A. C. Baker, for Respondent.

The officer failed to summon a jury to try the rights of property and no waiver having been made, he released the property at his peril. He could not call on the respondent for indemnity. C. L. Chap. 48, p. 428; C. L. Chap. 48, p. 442,

Sec. 220; *Curtis* v. *Patterson,* 8 Cow. 67; *Magne* v. *Seymour,* 5 Wend. 307; *Platt* v. *Sherry,* 7 Wend. 239; *Long* v. *Neville,* 36 Cal. 459, 95 Am. Dec. 199; Freeman on Executions, p. 277; Harlow on Sheriffs, p. 132.

SHIELDS, C. J.—This is an action against defendant, who is sheriff of Maricopa county, for alleged negligent acts and omissions, by which the plaintiff lost the collection of a certain debt due him from one Zent, and for a false return. The facts, so far as necessary to look at them, are these: On the fifth day of January, A. D., 1885, the plaintiff commenced an action in justice's court against one William Zent, and on that day an attachment regularly issued in favor of the plaintiff against the goods and chattels of Zent, which was duly delivered to the defendant as sheriff, who on that day levied the same on a number of horses, harness, buggies and other property owned by Zent, and being his stock and outfit in a livery business in which he was then engaged. On the thirteenth of January the plaintiff obtained judgment against Zent for $215 and costs of suit, and on the succeeding day a writ of execution issued, directed to the defendant, as sheriff, and was duly delivered to him, with the usual command to make the money to satisfy the same out of the goods, chattels and property of Zent, and return the same in 15 days therefrom. The writ was returned by the sheriff February 13th thereafter, unsatisfied, and with the statement and return that he could find no property in Maricopa county out of which to satisfy the said execution.

The complaint in this case, in addition to the foregoing and other facts, states that "the defendant herein, N. M. Broadway, sheriff, as aforesaid, before the entry of judgment in said action as aforesaid, of *M. Mooney* against *William Zent,* in said justice court, without process or form of law, and without the consent of plaintiff in said action and plaintiff herein, and without receiving the undertaking required by law and by said writ of attachment, released the whole of said property so levied upon, as aforesaid, under and by virtue of said atachment, from the levy and seizure made by him under and by virtue of said attachment, and made return of said writ of attachment to said justice's court

on the sixth day of January, 1885, to the effect that he had levied upon said property and had released the same and thereafter, and before the entry of the judgment in said justice's court in the action of *M. Mooney* against *William Zent*, as aforesaid, he, the said N. M. Broadway, sheriff as aforesaid, made a levy upon the same property under and by virtue of another writ of attachment placed in his hands for service. That by means of the premises, and by the unlawful action of said N. M. Broadway, sheriff as aforesaid, and defendant herein, in releasing the said property from the writ of attachment, as aforesaid, the plaintiff has been deprived of the means of obtaining satisfaction of said judgment in said justice's court, as aforesaid, and has lost the same, to the damage of the plaintiff in the sum of two hundred and thirty-three 95-100 dollars, besides interest on said sum from the thirtieth day of January, 1885, at the rate of ten per cent. per annum."

These facts were all admitted by the defendant on the trial, who defended on the ground that, at the time the attachment was put in his hands, there was a chattel mortgage on the property executed by Zent to Bernard Goldman and J. L. B. Alexander, and that these gentlemen served notice on him that, unless himself or Mooney paid the amount claimed due on such mortgage, they would hold him responsible for any damage by reason of the levy of the attachment; that Mooney declined to pay the same, and he thereupon abandoned the levy, and released the property, on the ground stated in the third paragraph of his answer, that the risk was more than could be reasonably expected of the sheriff, the premises considered, by the plaintiff.

The case was tried by Judge Pinney without a jury, who on May 21, 1885, directed judgment for the plaintiff for $240.40, and costs of suit. His findings of facts, so far as pertinent to this case, are as follows: "On January 5, 1885, the plaintiff herein commenced an action in justice's court of Phœnix precinct, Maricopa county, Arizona, against one William Zent, to recover of and from said Zent the sum of $215 upon account. Summons and writ of attachment duly issued in such action, and were placed in

hands of the defendant herein for service, who then was and is now the sheriff of Maricopa county, in this territory. Such summons was regularly served upon the said Zent, and the defendant herein duly levied such writ of attachment on January 5, 1885, by taking into his possession certain horses and buggies then in the possession of the said Zent, and employed and used by him in the livery-stable business in Phœnix, Arizona, and that such property was of the value of $3,000. (2) Upon such levy, Alexander & Goldman made demand on defendant that he pay, or cause to be paid, to them the amount due upon a certain chattel mortgage embracing the property seized, executed by said Zent to said Alexander & Goldman, or that the defendant would be held responsible for damages. The plaintiff, upon notice from the defendant, refused payment, and required defendant to retain the property, and, being required, without any jury being called to try such claim of Alexander & Goldman, to indemnify defendant against the amount on such chattel mortgage, (about $1,500,) refused, and therefore defendant released the property. (3) On January 13, 1885, plaintiff recovered judgment in said action in said justice's court against the said Zent for $215, and the further sum of $18.95 costs. Execution, being issued thereon, was returned by defendant not satisfied; and said Zent possessed no property other than the property so released from attachment out of which said judgment could be made, and said judgment remained unsatisfied." The judge also finds the mortgage was due in November, 1884, but that Zent continued to keep possession of the property, and to use and control it as formerly, and as if no mortgage was upon it; and also from the facts proven, there was no obligation on the part of the plaintiff to pay said mortgage, or comply with the demands of the defendant.

Was the judgment of the court below warranted by the evidence? This is the only question before us raised by any assignment of error.

It is not necessary to look beyond the statutes of this territory in deciding this case. The statutes in relation to personal mortgages in certain cases provide that "a right of redemption shall remain in the mortgagor until the same

shall have been foreclosed by due process of law, or by agreement between the parties to the mortgage, which agreement shall be entered in the record of the mortgage." Comp. Laws, *c.* 82 § 4, p. 615. And, again: "All property mortgaged in pursuance of the provisions of this act may be attached at the suit of the creditors of the mortgagor. If such property be attached, then such creditor shall pay or tender to the mortgagee the actual amount due him on such mortgage, before the officer making such attachment shall be entitled to the actual possession of such property. When property thus situated and thus redeemed shall have been sold by the officers by virtue of due legal proceedings, out of the proceeds of the sale he shall *first* pay the creditor the amount advanced by him to pay the mortgage, with legal interest thereon; *second,* pay all legal fees and costs appertaining to the judgment, execution, and sale; *third,* pay the judgment creditor the amount of the judgment, and any remaining surplus pay to the judgment debtor. If the creditor of the mortgagor prefers, he may cause to be attached the right of redemption of the mortgagor, and cause the same to be sold subject to the rights of the mortgagee. Such attachment shall be made by leaving a copy of the writ of attachment, with notice of the attachment, with the mortgagee. When the sale of such equity is made on an execution obtained by such attaching creditor, the sum realized shall be applied to the payment of costs, fees, discharge of the execution, and any remainder paid to the judgment debtor." Comp. Laws, *c.* 82, sec. (3648,) sec. 5, p. 615.

It is clear from these citations that in a case like the present where there has been no foreclosure of the mortgage, the creditor has the option of proceeding in either one of the two ways indicated, viz., by seizing the entire property covered by the mortgage, paying or tendering the amount due thereon; or by simply levying on the right or equity of redemption, subject to the rights of the holder of the mortgage security. This option is for the benefit of the creditor, and to be exercised by him in such manner as he may think best in furtherance of his interests. At one time he may prefer one course, at another time the other; but the officer should not be permitted to compel

him to take one particular course to the exclusion of the other, and so destroy the option the statute allows him.

Such was the result of the action of the sheriff in this case, and it cannot be sustained. This officer, in effect, said to the plaintiff: "You must pay Goldman & Alexander what they claim upon their mortgage, or I will release the property from levy, return your attachment, and proceed no further under it;" and, on the refusal of the plaintiff to pay, such was his action. Now, the plaintiff was under no obligation to pay the mortgage. He could do so if he saw fit, but there was no obligation resting upon him to do so. He could proceed for the right of redemption, which the evidence in this case shows was ample from which to secure payment of his claim. The conduct and communication of the plaintiff and his attorneys was a sufficient notification to the sheriff to levy upon and sell the right of redemption. We do not think any such notification was necessary. It was the sheriff's duty, aside from any special instructions, to make effective the writ placed in his hands, and which he undertook to execute. He found certain property in the possession of the debtor, worth $3,000, upon which was a mortgage for $1,500; then followed the notification to the plaintiff to the effect stated; and at last we have a complete abandonment of the plaintiff's process, by reason of which he lost his debt, and we find that the sheriff, according to his own statement, proceeded to levy upon the property by virtue of another writ of attachment, at the suit of some other creditor. Under the circumstances, it is idle to say the sheriff did his duty, and he must make good the debt that through his misconduct was lost to the plaintiff. We do not think there was any intentional neglect of duty on the part of the sheriff, but he seems to have relied too much on the advice of Goldman & Alexander, or paid too much attention to their threats. The judgment is warranted by the undisputed testimony in the case, and is affirmed.

These are some of the findings in which we think the court erred; for instance, the findings that the chattel mortgage is void. There is no testimony whatever in the case upon which to base such a finding. Neither is it necessary

to consider what our decision might be in this case had the property been in the possession of the mortgagees at the time the writ of attachment issued, and they were disputing the right of the sheriff to levy at all, instead of simply demanding the payment of the mortgage. These are questions of no little difficulty, but not necessary to be decided in this cause, and we withhold a decision thereon until the questions are before us. We may add, however, that these difficulties do not spring from the nature of the instrument at all, for a chattel mortgage in this territory is a security merely, and until foreclosure, or some act tantamount thereto, the title to the property mortgaged remains in the mortgagor; but such difficulties arise when a rightful possession of a mortgagee, under a valid mortgage, is interfered with. It may be that the statutes of the territory are broad enough to meet such cases; but, the decisions of the questions not being necessary in disposing of this case, we do not pass upon them.

The judgment is affirmed.

Barnes and Porter, JJ., concur.

[Civil No. 163. Filed June 4, 1886.]

[S. C. 11 Pac. 122.]

JAMES B. WALLER, Plaintiff and Respondent, v. THOMAS HUGHES, Ex-officio Tax Collector, Defendant and Appellant.

1. TAXATION—CHAPT. 33, COMP. LAWS 1877—§§ 4, 5, 18, CITED—NET PROCEEDS OF MINES par. 2062 to 2073, Comp. Laws 1877, cited—REPEALED BY ACT NO. 40 AND ACT NO. 77, LAWS OF 1881—CHAPT. 33, COMP. LAWS OF 1877 REPEALED CHAPT. 33, HOWELL'S CODE, COMP. LAWS 1864, p. 312—EXEMPTIONS.—No property within the territory is exempt from the operation of these revenue laws, unless put beyond them designedly and unequivocally by the legislature or other sovereign power.

2. SAME—MINES TAXABLE AS REAL ESTATE—"REAL ESTATE" AS USED

IN REVENUE ACT INCLUDES "MINES"—"MINES" INCLUDES PATENTED CLAIMS AND CLAIMS WHERE THE PURCHASE MONEY HAS BEEN PAID AND THE PATENT IS NOT YET ISSUED BY THE GOVERNMENT—"MINING CLAIMS" OR "MINING INTERESTS" REGARDED AS PERSONALTY AND TAXABLE UNDER THE REVENUE ACT.—"Mines," to which patents have been issued, are clearly within the definition of the word "lands," and also "real estate," as used in this act, which terms are defined in chapt. 1, Compiled Laws 1877, and are subject to taxation as real estate. So also mining claims where the occupants have paid to the proper officer of the United States the purchase money therefor, although patent may not have issued; in such cases, by the payment of the money and the acceptance of it by the government, the land is his, the government holding the legal title in trust. "Mining claims" or "mining interests" as used in the revenue act includes that large class of cases where the occupants of mining property do not claim any ownership whatever in the lands in their possession. They simply enter upon the public lands and make improvements thereon, which, while the possession is tolerated by the government, are looked upon as valuable property. This property is subject to taxation under the head of personal property.

3. SAME—WITHOUT ASSESSMENT TAXES ARE NULLITIES—ARBITRARY ASSESSMENT WITHOUT REFERENCE TO ACTUAL VALUE VOID.—Where it appears that the assessor arbitrarily listed mining claims at $500, without reference to the actual value thereof and without knowledge of such real value, such assessment cannot be upheld. Taxes by valuation cannot be apportioned without assessment. Moreover, it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follows it. Without an assessment they have no support, and are nullities.

4. SAME—ASSESSMENT SHOULD BE OF TRUE CASH VALUE.—Assessment in this class of cases should be, as in all others, of the true cash value.

APPEAL from the County Court in and for the County of Pima. Affirmed.

The facts are stated in the opinion.

Hereford & Lovell, for Appellant.

The plaintiff is the owner of the patented mines mentioned in the complaint. The Government having parted with its

title to these properties for a valuable consideration, the plaintiff became the owner in fee thereof.

Lands sold by the United States are liable to taxation—lands sold by the United States can in no case be called the property of the United States. *Carroll* v. *Safford,* 3 How. 441; *People* v. *Shearer,* 30 Cal. 647.

Haynes & Styles, for Respondent.

Unpatented mining claims are not taxable; the taxing officers holding them to be exempt under Section 5, of Chapter 33, of the Compiled Laws, which contains an exclusion in terms.

We hold that the same exclusion applies to the patented as well as to unpatented claims.

Previous to 1875 the term "real estate" in the revenue law of the Territory included "mining claims." Compiled Laws of Arizona, 1864-1871, p. 312. And the "possession or right of possession to" such claims, as well as claims patented, was taxable. Our statute was copied from the Nevada statute. *Hale & Norcross Co.* v. *Storey Co.,* 1 Nev. 104; *Forbes* v. *Gracey,* 94 U. S. 762. This attempt to tax mining property like ordinary property was seen to be practically impossible and Nevada adopted a method for the Taxation of the Net Proceeds of Mines, which has been sustained by the courts of Nevada as a proper method of taxing such property. *State* v. *Kruttschnitt,* 4 Nev. 178.

In 1875 Arizona adopted the Nevada system, and at the same time it changed Sec. 5 of Chapter 33 to its present form, as did also the Nevada Legislature; and thereafter and until the repeal of the Net Proceeds Act in 1881, no one thought of attempting to tax any mine or mining claim specifically.

The repeal of the Net Proceeds Act did not strike out the exemption contained in the Revenue Act; it merely abolished that mode of taxation and established no other. Unpatented mining claims are not taxable and there is no difference in the estate of an unpatented claim and a patented one. They are recognized by the legislature as one and the same in all other provisions relating thereto. Chapter 27, Compiled Laws; Probate Laws, Chap. 29, Sec. 154; Statute of Limita-

tions, Compiled Laws, p. 361; Compiled Laws, Chapter 48, Sec. 263; Compiled Laws, p. 512; Compiled Laws, p. 513; Act No. 95, passed in 1881; also Act No. 91, 1881; Act No. 30, 1883.

To say that the Legislature intended tc tax mining claims which are patented, and not the others, is to presume a premium offered to those who do not patent, which would be in contravention of the policy of the government, which desires to sell and finally dispose of its mineral lands, at the price fixed by law. *Hale & Norcross Co.* v. *Storey Co., supra.*

Whether any tax assessed would be legal or not, this particular tax is illegal, because there was no valuation, and without a valuation there is no assessment, and no tax can be levied or collected. Cooley on Taxation, pp. 258, 259, and notes; Desty on Taxation, Vol. 1, p. 546, Title Valuation; Compiled Laws of Arizona, Chap. 33, Secs. 8, 13 and 18.

The discrimination made between patented and unpatented claims, even if made by the legislature, would be void, as wanting both equality and uniformity, in the taxation of this class of property. Cooley on Taxation, p. 128, and note.

SHIELDS, C. J.—This case is submitted on the facts stated in the complaint. Two questions are before the court for decision: *First.* Whether, under the laws of Arizona, mining claims, for which patents have been issued by the United States, are taxable at all, or for any purpose. *Second.* Should it be decided that such mining claims are taxable, was there any legal or valid assessment of taxes on the mining claims of the plaintiff, the respondent herein, for the year A. D. 1885?

The portions of the complaint which raise these questions are the following: "That the plaintiff, at all the time hereinafter mentioned, was, and he now is, the owner of the following described mining claims, in said county of Pima, to wit: (1) The General Craig mining claim, in the Aztec mining district, covering 20.66 acres. (2) The Missouri mining claim, in the Aztec mining district, covering 20.66 acres. (3) The Whilden mining claim, in the Tyndall mining district, covering 20.66 acres. That said mining claims were

not and are not taxable, for any purpose whatever, under the laws of the Territory of Arizona."

The complaint also properly alleges that the defendant was and is the treasurer and *ex officio* tax collector of the county of Pima; that, for the year 1885, Hiram S. Stevens was the county assessor of the county of Pima, and as such assessor unlawfully placed the three mining claims of the plaintiff upon his assessment list or roll, and assessed the value of each at the sum of $500; and further states the amount of taxes to be collected from each of such claims.

Paragraph 8 of the complaint is as follows: "That the said Stevens, as such assessor, at the time of his said assessment, assessed but ninety-four mining claims for taxation, in said county of Pima; and wholly failed, neglected, and refused to assess other mining claims for taxation, although he well knew that there were many other such mining claims in said county equally subject to taxation with those of plaintiff, and with the ninety-one other mining claims so assessed; and that the said Stevens, further, did not value plaintiff's said mining claim for taxaiton, nor did he value any of the other ninety-one mining claims returned by him as assessed at $500 each; but said Stevens arbitrarily listed each and all of said ninety-four mining claims at the sum of $500, without reference or regard to the actual value of said mining claims, and without any knowledge of the real value thereof. And that said board of equalization wholly failed, neglected, and refused to place upon the said tax-list or assessment roll, or to certify for taxation, any mining claims other than those of the plaintiff, and the ninety-one others so assessed; although said board were informed officially, and knew, that there were many other mining claims in said county equally subject to taxation with those of the plaintiff, and the said ninety-one others. And plaintiff avers and charges that in listing property for taxation, and in assessing and levying upon the same, the said assessor, and the said board of equalization, and the said board of supervisors, unlawfully listed and assessed all mining claims in said county of Pima, for which a patent had been granted by the United States; and unlawfully and arbitrarily, and without right, assumed

and attempted to so list and assess only such patented mining claims, and wholly failed, neglected, and refused to so list or assess any other kind of mining claims in said county, although there were others; both said assessor and said board of equalization knew that there were many hundreds of unpatented mining claims in said county. And plaintiff avers and charges that by the said unlawful acts of said assessor, and said board of equalization, the whole of the burden of taxation upon the class of property known as 'mining claims,' in said county, was and is unjustly laid upon said patented mining claims, and said unpatented mining claims are left free from any taxation whatever."

Other portions of the complaint set out with precision the proceedings to levy the tax in question, but the foregoing is deemed all that is necessary to guide for a disposition of the questions raised. These questions are important, and demand and have received serious consideration. A right disposition of them depends upon the correct construction of chapter 33 of the Compiled Laws of Arizona, which is the revenue law of the territory.

As the law now stands, the right to tax, if at all, must come from this chapter of the Compiled Laws. The act providing for the taxation of the net proceeds of mines, even if it ever had any validity, so far as it may have been in conflict with the revenue law,—(that act being prior in date to the revenue law,) was repealed by the legislature of 1881. It is important, therefore, to have in mind a clear understanding of the provisions of the revenue law as found in the chapter of the Compiled Laws to which reference has been made. For convenience, and that our views may be better understood, such provisions of the revenue law as bear upon the questions raised are referred to by us.

Section 4 provides that "all property, of every kind and nature whatsoever, within this territory, shall be subject to taxation, except such property as is therein specially exempt." Then follows a list of such exempt property, consisting of property of a public nature, and such as is devoted to religious and educational purposes. But no property of a private character is exempt, except a certain

amount belonging to widows and orphans. Then follows section 5, as follows:

"Sec. 5. The term 'real estate,' whenever used in this act, shall be deemed and taken to mean and include, and it is hereby declared to mean and include, the ownership of, or claim to, or possession of, or right of possession to, any land within the territory; and the claim by, or possession of, any person, firm, corporation, association, or company, to any land, shall be listed under the head of 'real estate:' provided, that the term 'land,' as used in this section, shall not be so construed as to include mining claims, either lode or placer; the term 'personal property,' whenever used in this act, shall be deemed and taken to mean and include all household and kitchen furniture; all law, medical, and miscellaneous libraries; all goods, wares, and merchandise; all chattels, of every kind and description; all money on hand, or on deposit in bank or banks with individuals; all money at interest, secured by mortgage or otherwise;" and a large variety of other things, which are all works and improvements; and "all property of whatsoever kind or nature not included in the term 'real estate,' as said term is defined in this act."

The eighteenth section declares "that the assessor shall prepare a tax-list or assessment roll in the books furnished him by the board of supervisors, in which books he shall set down the real estate and personal property; and, among the things he is to do, he must write down "all improvements on public lands, describing as nearly as possible the location of such improvements."

The foregoing are the only provisions of the revenue law that it is deemed necessary to refer to in this controversy.

The present revenue law, to which the foregoing references are made, takes the place of chapter 33 of Howell's Code, which it repeals. Section 5 of that Code (Comp. Laws 1864, p. 312) provided that "the term 'real estate,' whenever used in this act, shall be deemed and taken to mean and include, and it is hereby declared to mean and include, the ownership of, or claim to, or possession of, or right of possession to, any land or mining claims, either lode or placer, within the territory; and the claim by, or possession of, any per-

son, firm, corporation, association, or company, to any land or mining claims, either lode or placer, shall be listed under the head of 'real estate.'" The term "personal property" in the Howell Code is declared to include the same articles as the same term in section 5 of the present revenue law; and, indeed, all of section 5 in the Howell Code, except as above quoted, is the same as the similar section in the present law.

Now, after this somewhat lengthy reference to the present and former revenue laws of the territory, we come to consider what is meant by the expression "mining claim," in the existing law, and the extent and purpose of the exemption with reference thereto contained therein. Clearly, the law as it stands now was not intended to, and does not, exempt from taxation mining property to which a patent has actually been issued by the government of the United States. Such a consideration as that would be in conflict with the very act itself, which provides, as we have seen, that "all property, of every kind and nature whatever, within this territory, shall be subject to taxation, except" in the cases enumerated.

There is nothing in the exceptions to justify the claim that mines to which patents have been issued should not be subject to taxation. Such property is clearly within the definition of the word "lands," and also "real estate," in chapter 1 of the Compiled Laws, which declares these words "shall be construed to include lands, tenements, and real estate, and all rights thereto and interests therein. In such case the person to whom a patent issues becomes the absolute owner of the property named in it, and as to such property the government parts with all right and title therein. The grantee in such patent is an owner of "land" and "real estate," just as much and as fully as the owner of agricultural or other lands. That being so, the legislature could never have intended that it should not bear its just proportion of taxation. Neither does the revenue law exempt from taxation, nor can it be construed so to do, mining rights or claims, where the occupants or claimants have paid to the proper officer of the United States the purchase money therefor, although the patent may not have been

issued to them. By the payment of the money by him in such case, and its acceptance by the government, the land is his, the government of the United States only holding the legal title in trust for him. In such case the property is private property. To hold otherwise would encourage owners and occupants to delay calling for a patent for the very purpose of avoiding taxation. Such has been the construction given to these laws in California. *State* v. *Moore*, 12 Cal. 56; *State* v. *Shearer*, 30 Cal. 645.

The revenue laws of this territory do not, in terms, exempt such property from taxation; and as the interest acquired by the purchaser in such cases becomes a part of his individual property, it is as much subject to the taxing power of the territory as any other piece or article of property within its limits and protected by its laws. No property within the territory is exempt from the operation of these revenue laws, unless put beyond them designedly and unequivocally by the legislature or other sovereign power. A mere inference that certain property is exempt from taxation will never do, nor will it be assumed unless the language used is too clear to admit of doubt. *Gilman* v. *City of Sheboygan*, 2 Blackf. 510; *Iowa Homestead Co.* v. *Webster*, 21 Iowa, 221.

Judge Cooley declares the rule as follows: "The intention to exempt must in all cases be expressed in clear and unambiguous terms. Taxation is the rule, exemption is the exception. All exemptions are to be strictly construed. They embrace only what is within their terms." Cooley, Tax'n, 146.

In *Providence Bank* v. *Billings*, 4 Pet. 514, a leading case, Chief Justice Marshall says: "That the taxing power is of vital importance,—that it is essential to the existence of government,— are truths which it cannot be necessary to reaffirm. As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."

In *Philadelphia, etc., R. R. Co.* v. *Maryland*, 10 How. 376, Chief Justice Taney said: "This court on several occasions

has held that the taxing power of a state is never presumed to be relinquished unless the intention to relinquish is declared in clear and unambiguous terms."

In *Vicksburg, etc., R. R. Co.* v. *Dennis,* 116 U. S. 665, 6 Sup. Ct. Rep. 625, in speaking of taxation, and the surrender thereof, Justice Gray, who delivers the opinion of the court, says: "It has been said that neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken: that exemption from taxation should never be assumed unless the language used is too clear to admit of doubt; that nothing can be taken against the state by presumption or inference. The surrender, when claimed, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the legislature, that doubt must be solved in favor of the state; that a state cannot, by ambiguous language, be deprived of this highest attribute of sovereignty; that any contract of exemption is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require; and that such exemptions are regarded as in derogation of the sovereign authority, and of common right, and therefore not to be extended beyond the exact and express requirement of the grants construed *strictissimi juris.*". This case also holds that the omission even for several years of the taxing officers to assess a particular species of property, or impose a tax, is of no importance, and cannot control the duty imposed by law on their successor, nor the leagl construction of the law by the courts.

These authorities fully sustain the position we take with reference to the property named, and clearly show that such property is taxable under the revenue law of the territory, and is not within the exemption required, nor is it included in the expression "mining claims."

It remains now to determine what is meant by the expression "mining claims" in the revenue law, and that we proceed to do. There is a large class of cases where the

occupants of mining property do not claim any ownership whatever in the lands in their possession. They simply enter upon the public lands, and make improvements thereon. So far as the government is concerned, such persons may be and often are naked trespassers. The improvements, however, that they put upon the land, while tolerated in its possession by the government, are looked upon as valuable property interests, giving to their possessors not only a home, but oftentimes a large and lucrative income. The possession and interest of the possessors of such a holding, wherever that state of things exists, have always been treated as property; have been sold upon execution and judgments, and transferred by mortgage and otherwise.

In speaking of this class of property, the supreme court of California says: "The whole course of legislation and judicial decisions in this state since its organization has recognized a qualified ownership of the mines in private individuals. Contracts affecting mining claims have been constantly enforced. Remedies have been afforded to those whose possession has been disturbed, or whose claims have been trespassed upon, by others; and the right of the locator to sell, hypothecate, or in any manner dispose of his property in a mining claim has been upheld, as well by legislative enactment as by judicial decisions."

The history of legislation in this territory, and the most casual examination of such legislation, show most clearly that from the first a distinction has been made between mines and interests in mines. Nearly every mining law speaks of mines and mining interests in such a way as to clearly indicate that there was a distinction between the two well understood and recognized; mines being regarded as covering the two species of property first as referred to by us, and mining interests the latter.

Now, this property is also subject to taxation. It has been continually taxed elsewhere, as the California cases cited show. No one will contend that it is not within the power of the legislature to subject such property to taxation. The power to do so is undoubted and complete. Under the Howell Code such property and interests were taxed, but it is said that the revenue law which took the place of the

Howell Code exempts such property from taxation; and, indeed, the position is boldly asserted that mines absolutely owned, and to which patent has been issued, are also exempt under the present law. There is no foundation for such assertion in either instance. We have already shown the fallacy of such a position with reference to mines actually owned. No stronger claim can be made in favor of the exemption of mining claims, as we construe that expression to mean. The revenue law does not exempt, nor does it undertake to exempt, mining claims from taxation. It simply provides that the term "land," as used in the law, shall not be so construed as to include mining claims, either lode or placer. In this regard the present law changed the rule of taxation in force under the Howell Code, and left such property subject to taxation under the head of "personal property," as works and improvements upon public lands. The Howell Code, as it stood, left such property subject to taxation both as real estate and personal property. To avoid embarrassment, and a possible double taxation, the present law prohibited the taxation of such property as real estate.

Upon the authorities cited, that before individual property shall be declared free from taxation the exemption therefrom in the revenue law must exist in clear and unambiguous terms, we might leave this question, for such exemption does not here exist. The same question, however, has been discussed elsewhere, and judicial decisions similar to this one we pronounce are not wanting.

Thus, the supreme court of Illinois says: "The general government still retains the title to a large proportion of the land in many of our populous and wealthy counties, on which are permanent improvements of great intrinsic value, and hence the necessity of passing laws adapted to property thus peculiarly situated. To allow a class of persons to hold and enjoy large fortunes beyond the reach of their creditors was too shocking to a sense of justice to allow it to pass unnoticed by the legislature, and consequently it has, by repeated acts, treated these improvements as the proper subjects of transfer and ownership. They are made sufficient consideration for contracts and promises. Lands thus owned

and occupied are treated as proper subjects for action of trespass, forcible entry and detainer, forcible detainer, and ejectment; and, indeed, they are throughout treated as the property of the individuals possessing them; and, as such, they are subject to the control and disposition of the law, so far as the occupant is concerned, as much as if he owned the fee, except, however, that no disposition can be made of them so as to affect in any way a title which may be derived from the United States. In cases of ejectment for these claims, it is only necessary for the plaintiff to deduce a regular title from the first occupant, (unless his claim has been abandoned,) who is considered as the fountain of his title, which will prevail, unless opposed by a government title, when it vanishes. Upon such titles depend the security of extensive plantations, and some of the largest manufactories, mills, and machinery in the state. Such is the situation of many populous villages and flourishing towns." *People* v. *Shearer,* 30 Cal. 656.

These observations apply with cogency and force to the condition of affairs in this territory. See, also, *Thredgill* v. *Pintard,* 12 How. 36.

In *People v. Shearer,* 30 Cal. 656, the court says: "These possessions, then, are recognized as a species of property subsisting in the hands of the citizen. It is not the land itself, nor the title to the land, nor is it the identical estate held by the United States. It is not the pre-emption right, but is the possession and valuable use of the land subsisting in the citizen. Why should it not contribute its proper share, according to the value of the interest, whatever it may be, of the taxes necessary to sustain the government which recognizes and protects it?" The same case holds that a mining claim must stand on the same footing with a claim for agricultural purposes.

No further discussion is deemed necessary in stating our views upon the question of what mines and mining interests are taxable under the revenue law.

The other question raised by the record yet remains, and that may be disposed of more briefly. It is admitted that the manner of making the assessment in this case is correctly stated in the complaint. It is too plain for discussion that

no such assessment can be upheld. It violates every rule upon which taxation proceeds, and leaves everything to depend on the arbitrary will of the assessing officer. The facts stated show, not an assessment, but an arbitrary exaction. In his admirable work on taxation, Judge Cooley says of an assessment: "Taxes by valuation cannot be a portion without it. Moreover, it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities." The law requires the assessor to ascertain, "by diligent inquiry and examination," all property subject to taxation; "then determine the full cash value" thereof. Clearly, nothing of the kind was attempted here. *Wattles* v. *Lapeer*, 40 Mich. 624; *Dickson* v. *Reynolds*, 48 Mich. 158; 12 N. W. 24.

In conclusion, we may remark that the assessment in this class of cases should be, as in all others, of the true cash value.

For the want of an assessment, under the law, the decree below was properly granted, and will be affirmed.

Barnes and Porter, JJ., concur.

[Crim. Nos. 33, 34, 35. Filed June 8, 1886.]

[S. C. 11 Pac. 472.]

THE UNITED STATES OF AMERICA, Plaintiff and Respondent, v. AMMON TENNEY, Defendant and Appellant.

SAME v. PETER J. CHRISTOFFERSON.

SAME v. I. C. KEMP.

On rehearing. Former opinion, *ante*, p. 29.

1. CRIMINAL LAW—EDMUNDS ACT—POLYGAMY—INDICTMENT—TO ALLEGE COHABITATION AFTER MARRIAGE IN COUNT FOR POLYGAMY NOT FATAL BEING MERE SURPLUSAGE—22 U. S. Stat. L. 30; Supp. Rev. St. U. S. 1891, Chap. 47, p. 331.—Where in a count in an indict-

ment under the Edmunds Act after properly alleging a polygamous marriage the pleader proceeds further and states that cohabitation followed such marriage, such latter statement is mere surplusage and does not render the count bad.

2. SAME—EVIDENCE—ADMISSIONS OF DEFENDANT COMPETENT IN PROOF OF MARRIAGE—OPEN COHABITATION COMPETENT—RULE OF PROOF OF SECOND MARRIAGE SAME AS OF FIRST—NO CEREMONY OF MARRIAGE REQUIRED IN THIS TERRITORY—HIGHEST EVIDENCE OF MARRIAGE NOT REQUIRED—ADMISSIONS AND COHABITATION SUFFICIENT TO ESTABLISH MARRIAGE.—Admissions of defendant, often and apparently deliberately made, that he was married to the person named in the indictment and that he openly lived with the two women named as his wives and claimed them as such was competent and admissible evidence of marriage to person so named. Proof of second or subsequent marriage does not differ from proof of first one. The same kind of evidence is admissible in each case In this territory no ceremony of marriage is required. In this class of cases the highest evidence of marriage is not required. Such proof as was made in this case is competent and sufficient to establish marriage.

3. SAME—SAME—WHERE EVIDENCE IS INTRODUCED BY ONE PARTY HE HAS NO RIGHT TO COMPLAIN IF THE OTHER BE PERMITTED TO FOLLOW—PROOF OF COHABITATION IN ANOTHER TERRITORY COMPETENT TO PROVE CHARGE OF COHABITATION WITH MORE THAN ONE WOMAN UNDER THIRD COUNT—EVIDENCE COMPETENT AND ADMISSIBLE UNDER ANY COUNT OF INDICTMENT AT THE TIME GIVEN CANNOT PROPERLY BE EXCLUDED.—Where defendant testified that he lived with the two women in Utah as his wives he cannot complain if the prosecution be permitted to put questions and ascertain the facts concerning such statements. Proof of such cohabitation was admissible and competent under the third count of the indictment relating to cohabitation with more than one woman. Evidence material and competent under either count of an indictment at the time given cannot properly be excluded.

4. SAME—INSTRUCTIONS TO JURY—MUST BE TAKEN AS WHOLE—WHERE INSTRUCTION IS CORRECT IN PRINCIPLE IT MATTERS NOT WHERE THE WORDS ARE OBTAINED—WHERE IT APPEARS THAT THE INSTRUCTION OBJECTED TO AS ERRONEOUS IS AMBIGUOUS BUT THAT SUCH AMBIGUITY HAS BEEN CURED BY OTHER DEFINITE INSTRUCTIONS THERE WILL BE NO REVERSAL—INSTRUCTIONS AND EVIDENCE REVIEWED AT LENGTH.—Instructions to juries must be read and considered as a whole. Where the rule of proof of marriage was read from the Arizona Statute as an instruction to the jury as to what was proper and sufficient proof of marriage, and objection

taken for the reason that the law of Arizona was not applicable to the case, if the principle laid down was correct—as it was—it is of no importance where the court obtained the words with which he announced the principle. Where the court instructed the jury in substance that even though the defendant had two wives in the territory of Utah, in violation of law, the fact that he had continued the same offense for many years, it being a continuous offense, would be no defense to him to make against this prosecution. Although such instruction taken alone was ambiguous and susceptible of misconstruction by the jury and erroneous, yet, when read with positive instructions given with it, it appears that the jury could not have been misled, and there was no reversable error. Instructions and evidence reviewed at length.

5. EDMUNDS ACT—PURPOSE OF—POLYGAMOUS MARRIAGES VOID—KNOWLEDGE THAT FIRST WIFE IS LIVING IMMATERIAL.—Under no definition of marriage, as understood by Christian people, can polygamous unions be looked upon as marriages. These unions are what the Edmunds law aims to punish and suppress. It is not necessary in order to make out the offense, that the second marriage should be a valid one. Every bigamous or polygamous marriage is void, and it is the *entering into the* void marriage while a *valid* one is in existence that the law punishes. Neither has the knowledge of the fact that a prior wife was living anything to do with the question.

Porter, J., dissenting upon the ground that the offense of polygamy was shown to have been barred by the statute of limitations.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. Affirmed.

The facts are stated in the opinion.

John A. Rush & J. C. Herndon, (Thos. M. Fitch, of Counsel), for Appellant.

J. A. Zabriskie, U. S. Dist. Atty., Ed. W. Wells, Asst. U. S. Dist. Atty., for Respondent.

SHIELDS, C. J.—In 1882 the congress of the United States passed an act to amend section 5352 of the Revised Statutes of the United States, in reference to polygamy, and

for other purposes. This is the "Edmunds Law," so called. Section 1 provides that "every person who has a husband or wife living, who, in a territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single; and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a territory or other place over which the United States have exclusive jurisdiction,—is guilty of polygamy," and shall be punished as therein stated. In section 3 of the act it is provided "that if any male person, in a territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor," and, on conviction thereof, shall be punished in the manner provided.

The defendant, Ammon M. Tenney, was indicted under this law in the Third judicial district court of Arizona, at Prescott, in said territory. On trial before a jury he was convicted of the crime of polygamy. He brings the case to this court, alleging errors in the rulings and instructions of the court below, and also defects in the indictment. We will consider the objections in the order we deem most convenient.

1. As to the pleadings. The indictment consists of three counts. The first count charges that in March, 1883, in Apache county, in the Third judicial district of Arizona, the defendant, being then and there a married man, and having a wife, Anna Tenney, with whom he was then living, unlawfully married another woman, Anna Eliza Tenney. The correctness in form of this portion of the count, and so far, is not questioned. The count then further recites that the defendant, from the time of his marriage to said Ann Eliza Tenney, continued to live and cohabit with her as his wife, up to the time of the finding of the indictment. The second count charges the defendant with having simultaneously, and on the same day, married more than one woman. As no proof was put in under this count, and no question raised upon it, no further attention need be given to it. The third count alleged a violation of section 3 of the act referred to. By it the defendant was charged with having cohabited with more than one woman

at the time named, and within the said Third judicial district. No question is made as to the sufficiency of this count. The defendant, as we have already stated, was convicted of polygamy under the first count.

Upon the trial the defendant insisted that such first count was bad, and so fatally defective that no conviction could legally be had under it, for the reason that it alleged two separate and distinct offenses, to wit, polygamy and unlawful cohabitation. The objection is without force. It is perfectly clear that the indictment charges the three offenses named in the act, and separate count was intended to be and is given to each. It is true that the first count, after alleging with particularity and preciseness the polygamous marriage, does proceed further, and state that cohabition followed such marriage. This, perhaps, was unnecessary to make out a complete statement of the crime of polygamy under this law, but it does not follow from that that the count is bad. The statement that cohabition followed such polygamous marriage was added as the result or effect of such marriage, and as part of a connected and complete description of that offense. Incidents and facts connected with and springing from the criminal act charged, although sometimes unnecessary, are very often put into an indictment so that there may be, on the face of the pleading, the complete history of the transaction that it is expected the proofs will disclose. In this case nothing more was undertaken. This is clear from the fact that unlawful cohabitation, as a separate and distinct offense, is afterwards charged in a count by itself. If the reference made to that subject in the first count is, as claimed by counsel, wholly unnecessary to a complete description of the crime of polygamy, we should still treat such reference as mere surplusage, without force to destroy a count otherwise sufficient. We have no doubt the count is a perfectly good one.

2. Objection is next made to the mode of proof of the marriage of defendant to Ann Eliza Tenney. This marriage was proven by the admissions of the defendant, often and apparently deliberately made, that he was married to such person, in the county of Apache, at the time named in the

indictment; and also by testimony showing that the defendant thereafter openly and notoriously lived with the two women named as his wives, in Apache county, and claimed them as such. In this connection it is proper to state that it was admitted the defendant was married to his first wife, Anna, in Utah, some years previous to his claimed marriage with Ann Eliza, in Arizona. On the argument we were urged to say that the proof of marriage just referred to was not sufficient proof thereof, and that, therefore, there was no legal marriage shown to have taken place with Ann Eliza; from which, it was argued, it would follow that the defendant was improperly convicted of polygamy. We are of the opinion that the proof given was competent and admissable evidence of a marriage to Ann Eliza Tenney, as charged. Its weight, of course, was for the jury. The jury regarded it as satisfactory proof of the marriage, and we have no doubt it was sufficient and proper evidence upon which they could find that fact.

The case of *Miles* v. *United States*, 103 U. S. 304, disposes of the questions raised here adversely to the defendant. In that case, which was a prosecution for bigamy, the trial judge charged the jury that the declarations of the accused that he was married were evidence that the jury might consider as tending to prove an actual marriage; and, further, that such marriage, the same as any other fact, might be proven by the admissions of the defendant, or by circumstantial evidence, and that it was not necessary to prove it by witnesses who were present at the ceremony. In commenting on this charge the Supreme Court of the United States in its opinion says: "We are of opinion that the district court committed no error in admitting such declarations, or in its charge to the jury concerning them." This is directly in point here, and decisive of the questions raised; nor does proof of a second or subsequent marriage, as intimated by counsel, differ from proof of a first one. The same kind of evidence is admissable in each case. 3 Greenl. Ev. § 205.

If, in addition to these authorities, reasons were necessary to be stated in support of our decisions on this branch of the case, such are not wanting, and springing, too, from the very

nature of the question discussed. Some of these reasons have been stated by the courts. The supreme court of Utah, considering a prosecution under the Edmunds law, says: "It is now a part of the history of this territory that in cases of this character nearly all of the witnesses upon whom the government has to depend to make out its case are unwilling witnesses. They are generally members of the different households of the defendant, under his influence, and also subjct to a powerful church pressure to compel them to shield the accused." *United States* v. *Snow*, 4 Utah, 295, 9 Pac. 686. Such difficulties are not confined to Utah alone. Similar embarrasments are met everywhere that this law is undertaken to be enforced. Again, in this territory, no ceremony of marriage is required. If a man and woman presently agree to take each other as husband and wife, and from that time live together professedly in that relation, such is a valid marriage here, even though there should be a total absence of all ceremony. These reasons, and the law as laid down by the highest tribunal in the country, induce us to reject the argument urged upon us that we should require in this class of cases the highest evidence of marriage, and to hold, as we do, that marriage may be proven by the admissions of the accused, where they appear to be freely and deliberately made, as in this case, or may be proved by circumstances satisfying a jury of such fact. In this case the marriage of the defendant with Ann Eliza Tenney was proven both by the admissions of the defendant, and by other facts and circumstances independent of such admissions. We have already said such proof was competent and sufficient.

3. It is next assigned for error that the court admitted proof of certain facts occurring in Utah several years prior to the finding of the indictment. Acording to such testimony the defendant stated at such time, and in Utah, that he was then living with the two women named as his wives; and some proof, aside from his statement, was put in, tending to show he did cohabit with both the women in that territory. This subject, however, was first opened up and gone into by the defendant himself, presumably for the purpose of disputing the theory of the prosecution that he was married

to Ann Eliza in Arizona. Such being the fact, he has no ground of complaint in this regard. The subject being thus open, the prosecution had an undoubted right to put inquiries, and ascertain facts, with reference thereto. But aside from this view, and not desiring to put our opinion entirely on that ground, the testimony was clearly competent and admissable under the third count of the indictment. If material and competent under either count at the time it was given, it was right to receive it, and it could not properly have been excluded. There was no error here.

4. We next consider the errors alleged to have been committed by the district judge in his charge. These are the principal grounds relied upon for a reversal, and we have therefore considered them with great care. There are isolated sentences in the charge that were selected and pressed upon our attention at the hearing, and as to the correctness of which, as so presented, we then had some doubts. A more careful examination of the entire charge, however, has convinced us that it is correct in law, and that, taken as a whole, and so read and considered, there is nothing in it of which the defendant can complain as presenting the case unfairly to the jury. The real issues upon which the jury were to pass were clearly stated, and the rules that must govern in the consideration of the case, so as to avoid a decision from mistake, passion, or prejudice, were well laid down.

Two objections, however, are made to the instruction. It is said, in the first place, that the district judge improperly followed a rule of evidence as to proof of marriage found in the statutes of Arizona; and, next, that the charge left the jury at liberty to find the marriage of the defendant to Ann Eliza Tenney in Arizona from facts indicating his marriage to her years before in Utah. We will consider these objections separately.

The statutes of Arizona referred to, provide that, in a prosecution for bigamy, it shall not be necessary to prove either marriage by the register or certificate thereof, or other record evidence, but the same may be proved by such evidence as is admissable to prove a marriage in other cases. In his charge the district judge referred to this statute, and said that, in this

case, no higher or further proof of the marriage of the defendant to Ann Eliza Tenney, in the territory of Arizona, was required than that demanded by this statute. It is contended that this instruction was erroneous for the reason that the statutes of Arizona had no application to this case, it being a prosecution for a violation of a law of the United States, and not for a violation of any law of the territory of Arizona. It is true that this is a prosecution for a violation of a statute of the United States, but in such prosecutions it is not an unusual thing to refer to the state or territorial statutes in matters of practice and evidence. *Clinton* v. *Englebrecht,* 13 Wall. 434; *Hornbuckle* v. *Toombs,* 18 Wall. 652. But the rule of evidence prescribed by the Arizona statute does not differ from the rule fixed by the supreme court of the United States in the *Miles Case,* as proper and sufficient evidence of marriage. The marriage laws of Arizona would govern as the proof of marriage. If the principle laid down by the district judge was correct,—and we have already seen that it was,—it is of no importance where he obtained the words with which he announced that principle,—whether from the statutes of Arizona, the opinion of the supreme court of the United States, or elsewhere. The instruction was correct in principle, and that is what we are concerned most about.

5. In the portion of the charge next claimed to be erroneous the court charged the jury, in substance, that, even though the defendant had two wives in the territory of Utah, in violation of law, the fact that he had continued the same offense for many years, it being a continuous offense, would be no defense for him to make against this prosecution. It is urged that this instruction authorized the jury to convict the defendant of the crime of polygamy upon evidence satisfying them of the fact of defendant's marriage to a second wife in the territory of Utah, and also that the expression, "it being a continuous offense," was a direction for the jury to find the defendant guilty upon the theory that if he married in Utah and brought his polygamous wife with him into the territory of Arizona, he would thus renew his marriage contract in this territory, so as to make him liable to a prosecution for polygamy, the same as though the marriage had taken place

within this territory. This is the argument made. While the instruction may be somewhat ambiguous, we think the criticism made upon it unfair, and a forced one. The court in this instruction had reference to the question of unlawful cohabitation alone, and to the proof which was in the case showing the defendant guilty of that offense in Utah.

To the proof against the defendant under the third count, tending to prove him guilty of that particular crime, it *would* be no defense for him to say he had been guilty of the similar crime in Utah. The court did not intend to say, and did not say, that, if the defendant was actually married to his second wife in Utah, it would not be a defense to urge that fact in this prosecution, to the charge of polygamy. That this is so made clear from the balance of the charge, portions of which we quote. He says: "In this case the question of marriage is directly involved, and that, perhaps, is the most proper starting point for your consideration." Then follows a very full and accurate definition of marriage, and the proof necessary to be adduced in support thereof. After that the court proceeds: "The next proposition involved is, when must the defendant, and where must the defendant, have committed this offense, in order to make him liable under the indictment that is here brought against him? He must have committed the offense within the Third judicial district, consisting of the counties of Mohave, Yavapai, and Apache, of the territory of Arizona, since the passage of this law that has been read in your hearing." And again: "No matter what the defendant and his wives' relation may have been in Utah, in New Mexico, or anywhere else, if within the last two years, in the territory of Arizona, they renewed their agreement, and within the time, and within the district named, made this contract between themselves to live together as man and wife, and he introduced and recognized them as such, I charge you that he is guilty, as charged in the first count of the indictment, of the crime of polygamy. These facts, gentlemen, must be proven to you beyond a reasonable doubt. It is not for the court to say how they will be proven, but, as I said before, it must be from the evidence in the case."

This instruction repeats in other language the one just

quoted, and to which objection was especially made, on the ground alleged that it permitted the jury to convict of polygamy on evidence of a marriage in Utah. While the instruction might have been plainer, there is no sort of doubt as to what was meant; and that meaning, clear from the charge as a whole, is that, even though he did have sexual intercourse with his second wife in Utah before his marriage to her under a promise of agreement of marriage, and this promise or agreement resulted in a marriage in Arizona, under which he lives with her, he would be guilty. Whether they "renewed" their agreement to become man and wife is, of course, of no importance. Did they actually marry here in Arizona? That was the question, and that question was fully and fairly submitted. It will not do to take a single expression like this one,—"renewed their agreement,"—and consider it alone and by itself. The whole charge must be taken together. Looking at it in this way, we repeat, the charge was correct, as the quotations we make show, and the expressions referred to above could not have misled the jury. But the judge, even in this, states the meaning of the expressions, and it is that the defendant and his second wife must have, "in the district named, made this contract to live together as man and wife," and defendant must have treated her as such.

The court, at further length, at the request of counsel for the defendant, instructed the jury as follows: "Even though the defendant married a second wife while his first wife was living, and without having obtained a divorce from his said first wife, yet the jury cannot find the defendant guilty of polygamy, as charged in the first count of the indictment, unless you further find that said second marriage was contracted within the said Third judicial district of the territory of Arizona." In giving this instruction the court said: "I charge you, and I have charged you, that the offense must be committed in this judicial district, and within the time spoken of since the passage of this law." The court gave a further request asked by defendant's counsel, as follows: "To find the defendant guilty in the first count of the indictment, it is necessary that you must find, from the evidence, that the defendant entered into a contract of marriage with Eliza Ten-

ney, in the territory of Arizona, which would have been a valid marriage according to the laws of Arizona territory if the former marriage had not been subsisting." A further request on the part of the defendant was given as follows: "To find the defendant guilty under any of the counts in the indictments, the jury must find, from the evidence, that the offense charged was committed between the twenty-second day of March, 1882, and the finding and presentation of this indictment." Again, at the request of defendant's counsel, the judge instructed the jury as follows: "The jury are instructed that marriage, within the purview of law upon which the two first counts of the indictment were founded, is defined to be a contract between a man and woman, by which they agree, each with the other, that they will assume the marital relations, and live together as husband and wife." Again, the court, on the further request of counsel for the defendant, instructed the jury as follows: "The jury are instructed that evidence tending to show cohabitation prior to March 22, 1882, does not raise any presumption from which either marriage or cohabitation can be inferred in this case." The court, in giving this instruction, followed it up by a statement as follows: "I stated at the time that that evidence was offered, and drawn out by the defense, that it alone, even if you believed and are satisfied that they did cohabit and live together, would not, of itself, be sufficient to warrant a verdict of guilty. It was admitted, and only admitted, to be considered with the other facts and circumstances of the case bearing upon the relations existing between these parties, and to enable the jury to determine and decide on the other facts in the case that bear upon the question of reputation. I charge you that in a case of this kind, that, if the only evidence of the existence of a marriage relation between the parties was that of reputation, it would not be of itself sufficient, but it is competent evidence to consider, in connection with the other facts in the case, to enable you to arrive at the verdict."

These rather extended quotations from the charge of the district judge to the jury are made because of the able and earnest argument of counsel in behalf of the defense, that

the instructions left the jury at liberty to convict the defendant of the crime of polygamy upon proof of a claimed marriage in the territory of Utah, and upon proof of unlawful cohabitation alone, and without proof of marriage here. These quotations show the argument has no basis in fact to rest upon. From the whole charge, taken together, we are satisfied that the jury could not have misunderstood the issues that were submitted to them, and that, before they could possibly convict the defendant of the crime of polygamy under the first count of the indictment, they must be satisfied that the marriage with Ann Eliza was entered into within the Third judicial district of the territory of Arizona. Indeed, there was no proof in the case from which it could be seriously urged that the defendant was married to Ann Eliza in Utah. There seems to have been no statement made by him of sufficient definiteness to show such marriage. In this regard the case is different from his statements as to his marriage in Arizona. These were distinctly and deliberately made, and, in connection with the proof of cohabitation, were sufficient evidence of marriage in Arizona.

6. Noticing the further objection made to the instruction, that too harshly criticised the offense of polygamy and bigamy, we refer to a somewhat similar instruction, and in a similar case, in *Reynolds* v. *United States*, 98 U. S. 145, and which was held proper by the supreme court of the United States. There the instruction, speaking of the offenses named in this law, was as follows: "I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on they multiply, and there are pure-minded women, and there are innocent children, innocent in sense, even beyond the degree of the innocence of childhood itself,—these are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the territory of Utah, just so do these victims multiply, and spread themselves over the land."

Before leaving this branch of the case, and in connection with the objections considered, we call attention to one or two facts of importance. We are not asked to reverse this

judgment upon the ground that there was not proof sufficient to go to the jury, and upon which they might fairly and honestly have found the defendant guilty of polygamy because of having married the said Ann Eliza in the territory of Arizona, and at such time as to render him liable to a prosecution under the provisions of the Edmunds law. No argument is addresed to us on that point, nor is any such claim made; neither could such a position be contended for, in view of the testimony in the case. We are satisfied, therefore, that the jury must have understood that they must find that there was a marriage between the defendant and Ann Eliza, and that such marriage took place at the time named in the indictment, and within the territory of Arizona. Nor is there any chance to say that the case was not fairly submitted to the jury by the court. At the request of counsel for the defendant the court instructed the jury "that this is a criminal prosecution, and the defendant is presumed to be innocent, and it devolves upon the prosecution to prove his guilt beyond a reasonable doubt; and the fact that the defendant has produced no witnesses to testify in his behalf should not be considered by the jury in deciding the case, but such decision must be based entirely upon the evidence before them." Again, in response to a further request from counsel for the defendant, the court said to the jury: "The law presumes the defendant innocent of the crime of which he is charged until he is proven guilty beyond a reasonable doubt, by competent evidence, and, if the evidence in this cause leaves upon the minds of the jury any reasonable doubt of the defendant's guilt, the law makes it your duty to acquit him." There are other portions of the charge which repeat, at very great length, and over and over again, the caution that the jury must not convict upon any other than such testimony as would satisfy them of the guilt of the defendant beyond a reasonable doubt, and what was meant by this expression was also explained to the jury. In conclusion the court explained the charge that was made in the various counts, so that the jury must have understood perfectly the offense named in each count, and what proof would be necessary to sustain it, and what facts must be found in order to convict.

7. It remains to notice such other objections as were urged against the charge, mainly as to the *effect* of the principles announced therein. It is said in this regard that the defendant could not possibly have married Ann Eliza in Arizona, in 1883, as he had married her long before in Utah. The error of this reasoning is that the facts do not warrant any such conclusion. We concede that if the defendant was married to Ann Eliza in Utah at the time it was claimed he had sexual relations with her there, and that such marital relation continued uninterruptedly up to the time of his indictment, he could not have been convicted in this case of the crime of polygamy. Under the statute of limitations this would be so, if for no other reason; but there is no proof of any such marriage, not even from the defendant himself, who did not see fit to go upon the stand to give testimony as to such marriage, or any other facts. Besides, the verdict of the jury is against this theory. There is some proof, undoubtedly, that the defendant had sexual relations with said Ann Eliza in Utah; but, in the absence of proof of even a polygamous marriage between them, and in the face of the fact established, and indeed admitted, that he was already married to one wife, and living with her, we must assume that his relations with Ann Eliza in Utah were those of an improper and meretricious sexual intimacy, rather than marriage. It is probable that these relations were under a promise of marriage some time in the future. That this intimacy subsequently, and in March, 1883, resulted in a polygamous marriage in Arizona,—and this is the effect of the admissions of the defendant, proven in the case, and other evidence,—could not have the effect of making a marriage between them in Utah. Under such circumstances, his first wife still being alive, he would be liable to a prosecution for polygamy in this territory. In such a prosecution, as was said by the district judge, he cannot be heard to say that he had improper relations with the same woman prior to such marriage, and elsewhere. The jury have found in this case, as we have heretofore said, that the marriage took place in Arizona, and not in Utah, and there was proof upon which they could so find; and they were distinctly told they must so find in order to convict under

the first count. Is not the case on this branch perfectly clear, in the absence of improper testimony upon which such finding could rest?

8. It is further objected that the marriage could not have taken place here or elsewhere, between the defendant and Ann Eliza, because both these parties knew that the defendant's first wife was still living and cohabiting with him. Upon this point we agree with counsel that under no definition of marriage, as understood by Christian people,—a union of one man with one woman, for life,—can these polygamous unions be looked upon as marriage. But counsel lose sight of the fact, which caused the enactment of the law in question, that there are such arrangements and unions, under which a man takes to himself two, three, or more women, and lives with them under a claim of marriage. These arrangements or unions are what the Edmunds law aims to punish and suppress. This was the kind of marriage meant by the district judge in his instructions touching the relation contracted and entered into in Arizona between the defendant and Ann Eliza Tenney. Such, too, is our meaning when we speak of the marriage between these parties. It is not necessary in order to make out the offense, that the second marriage should be a valid one. Every bigamous or polygamous marriage is void, and it is the *entering into the void* marriage while a *valid* one is in existence that the law punishes. *Regina* v. *Brawn,* 1 Car. & K. 144. Neither has knowledge of the fact that a prior wife was living, anything to do with the question. That knowledge usually exists, and is one of the unfortunate consequences of the practice of polygamy. But for that reason shall the law be turned aside? Clearly not. It is an additional reason, upon the contrary, why it should inexorably punish.

We have now considered all the objections urged against the conviction of the defendant in this case, and our conclusion is that the conviction was right, and must be affirmed. It is ordered accordingly.

BARNES, J., concurs.

PORTER, J., (*dissenting.*) I dissent from the opinion of the

majority of the court, as I think the defendant should only have been convicted under the second count of the indictment, charging a violation of the third section of the Edmunds act. The ground upon which I dissent is that the higher offense was shown to be barred by the statute of limitations. It was abundantly proven that the defendant made such acknowledgment in Arizona of the two women being his wives as to constitute a marriage here, just the same as though two ceremonies had been performed; but that same proof, and by the same witnesses, showed that the same relations existed between the parties in Utah and in New Mexico at a time anterior to the open acknowledgments in this territory, and a sufficient time to make the offense barred by the statute of limitations. My opinion is that from the time defendant first took on these marriage relations, and held both these women out as his wives, the statute began to run. Suppose two ceremonies had been performed, either in Utah or in Arizona, could the defendant have been indicted after the statutory time had elapsed, though every day he declared them to the world to be his wives? Is this a marriage every day, and can it be a continuing offense. Emphatically, I say, "No." In view of this condition of things, the Edmunds act provided that cohabitation with more than one woman without marriages should be punishable as a misdemeanor. The opinion of the majority of the court states that the proof only indicated a meretricious connection in Utah and New Mexico. I submit that the witnesses showed the same admissions, and the same general reputation of marriage and cohabiting, in each of the territories as in Arizona, and therefore I think it was as much a marriage there as here. Prosecutions and convictions for unlawful cohabitation can be continuously made.

[Civil No. 147. Filed June 12, 1886.]

[S. C. 11 Pac. 177.]

PASQUALE NIGRO, Plaintiff and Respondent, v. ROBERT HATCH, Defendant and Appellant.

1. APPEAL AND ERROR—PRACTICE—RECORD ON APPEAL—MEMORANDUM OF CLERK AS TO STATEMENT HAVING BEEN AGREED UPON NOT COMPLIANCE WITH STATUTE.—APPEAL MAY BE DISMISSED FOR SUCH DEFECT.—Where the statute provides that the "transcript on appeal" shall, when settled by the judge, be signed by him, "with the certificate that the same has been allowed and is correct;" and when, in lieu of this, it is agreed upon by the parties that they or their attorneys shall sign the same, "with a certificate that the same has been agreed upon by them and is correct," and the record does not show that either one or the other was done, but contains a memorandum, by the clerk, in no manner verified, that the statement was agreed upon, such memorandum is not a compliance with the statute and the court would be justified in declining to hear the case for this defect, without further examination.

2. FIXTURES—ERECTION OF BUILDING ON LEASED GROUND—EVIDENCE REVIEWED—NO PRESUMPTION UNDER CIRCUMSTANCES THAT IT BECAME ATTACHED TO REALTY—ACTS AND INTENT OF PARTIES IN PARTICULAR CASE USUALLY GOVERN—CHATTEL OWNED BY ONE PARTY AND AFFIXED TO LAND OF ANOTHER BUT CAPABLE OF SEVERANCE THEREFROM WITHOUT INJURY THERETO REMAINS PERSONALTY.—Where the evidence is clear that a building was erected upon leased land, upon blocks set upon the ground, with the intention of removal, and that it was so removed after plaintiff was dispossessed without injury to the realty, no presumption can arise from the erection of the building, under the circumstances, that it became attached to the realty. There is no universal rule by which a court can decide, in the abstract, disputed claims as to what is or is not a fixture. Neither the mode of annexation nor the manner of use is in all cases conclusive. It must usually depend on the express or implied understanding of the parties concerned. Where the ownership of the land is in one person, and of the thing affixed to it in another, and in its nature is capable of severance without injury to the former, the latter cannot, in contemplation of law, become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal property only.

APPEAL from a judgment of the District Court of the

Second Judicial District in and for the County of Cochise. Affirmed.

The facts are stated in the opinion.

Goodrich & Smith, for Appellant.

William Herring, (Thomas Smith of Counsel,) for Respondent.

SHIELDS, C. J.—This cause is not before us in such a manner as to require us to hear it upon its merits, were we disposed not to do so. The statutes of the territory provide that the "statement," as it is called in the court below, and which comes to this court as the "transcript on appeal," shall, when settled by the judge, be signed by him, "with the certificate that the same has been allowed and is correct;" and when, in lieu of this, it is agreed upon by the parties, they or their attorneys shall sign the same, "with a certificate that the same has been agreed upon by them, and is correct." In this case the record before us does not show that either one or the other was done. There is, indeed, a memorandum by the clerk, but in no manner verified, that the statement was agreed upon. This does not comply with the statute at all. For this defect, and without further examination, we would be justified in declining to hear the case; but as the point was not made by counsel, and as neither the amount or principle involved is of sufficient importance to warrant further litigation, we have concluded to decide the case upon its merits, as was agreed, simply calling attention to the state of the record for the benefit of counsel in the future.

It is possible that this transcript is correct; and from the fact that counsel have not questioned its correctness, we shall assume, in this case, that it is; but it is easy to see that in a case where the statute as to verification is not complied with, this court cannot say whether a transcript is correct or not where that fact is disputed or the question raised.

On the merits, the only question is whether a certain building, erected on a lot in Tombstone, became appurtenant to the land, and was part of the realty. The undisputed facts are

that the plaintiff, Nigro, rented lot 13, in block 20, city of Tombstone, in 1882, and in November of that year built the building in question, which was simply set upon blocks, and not in any way affixed to the realty. The building was intended to be removed, and could be without injury to the land. This is not disputed, and is, furthermore, made perfectly plain by the fact that Hatch, the appellant, who claims to have acted as sheriff in putting certain parties in possession of the lot in question, two days thereafter purchased the building from such parties, and removed it from the lot. No presumption could therefore arise from the putting up of the building, under the circumstances, that it became attached to the realty. There is no universal rule by which we can decide, in the abstract, disputed claims as to what is is not fixture. "Neither the mode of annexation, nor the manner of use, is in all cases conclusive. It must usually depend on the express or implied understanding of the parties concerned." *Wheeler* v. *Bedell,* 40 Mich. 693; *Adams v. Lee,* 31 Mich. 440; *Robertson* v. *Corsett,* 39 Mich. 777.

The defendant and appellant seems to have acted on the belief that the mere fact that the building was upon the land constituted it a part thereof, and he offered no proof to dispute the plaintiff's case, that the building was only temporarily on leased land, and was no way appurtenant thereto. Not only was this showing of respondent, Nigro, undisputed, but also the further one that appellant knew all about Nigro's ownership of the building, and the circumstances under which he erected it, prior to the latter's claimed purchase. Under such circumstances, there was no defense made to the action. These facts as stated being admitted, the judgment put in evidence by appellant could not have the effect to deprive Nigro of his house, whether Adams was a party to the suit in which such judgment was rendered or not. That judgment, instead of showing unity of ownership of the land and building, showed exactly the contrary, and to that extent aided the theory and claim of the plaintiff. It showed that the plaintiff had and claimed title to the building distinct from any claim or interest in the land on which it stood. From appellant's own proof, therefore, there was such an

entire absence of unity of title of the lot and building that a conveyance of the former would not of necessity convey the latter. "Where the ownership of the land is in one person, and of the thing affixed to it in another, and in its nature is capable of severance without injury to the former, the latter cannot, in contemplation of law, become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal estate only." *Adams* v. *Lee*, 31 Mich. 442.

The testimony being all one way, and as we have stated it, any extended discussion of the doctrine of fixtures becomes unimportant, and, indeed, improper.

The judgment, as well as the order, denying a new trial must be affirmed.

Barnes and Porter, JJ., concur.

[Civil No. 145. Filed July 8, 1886.]

[S. C. 11 Pac. 312.]

JAMES S. CLARK et al., Plaintiffs and Respondents, v. BENJAMIN TITUS, Defendant and Appellant.

1. PUBLIC LANDS—TOWN SITE ENTRIES—§ 2387 REV. ST. U. S. 1878 PROVIDES FOR ENTRY IN TRUST—EXECUTION OF TRUST AS TO DISPOSAL OF LOTS TO BE UNDER TERRITORIAL REGULATIONS—SPECULATIVE CONVEYANCE, BREACH OF TRUST—NO POWER TO CONVEY BUT TO OCCUPANTS—PURPOSE OF U. S. STATUTE TO PREVENT SPECULATION—§ 11, COMP. LAWS, 1877, CONSTRUED AND HELD VOID—TOWN SITE COMPANIES.—Act of Congress (Rev. St. U. S. 1878, Section 2387) provides that the "corporate authorities" may enter at the proper land office land settled and occupied, in trust for the several use and benefit of the occupants thereof; and that the execution of such trust as to the disposal of the lots shall be under such regulations as the state or territory may by law provide. The deed by Randall, Mayor, of 2168 lots out of 2394 to four persons, not in severalty as occupants, but as tenants in common, was a violation of the trust imposed upon him by law. He had no power to convey title to any one but to occupants. Any act of the legislature which would create a breach of such trust is void. §11,

c. 89, p. 585, Comp. Laws, 1877, attempting to give a town company or persons who select or lay out a town-site any advantage over any other occupant, reviewed and held inoperative.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Reversed.

The facts are stated in the opinion.

Thomas Mitchell and John Haynes, for Appellant.

That the facts set forth in the 1st and 2nd findings gave the plaintiffs no title appears from the following considerations:

1—That the title to the public domain can be obtained only in the manner prescribed by the Acts of Congress, and those acts nowhere prescribe a declaratory statement such as *Clark et al.*, filed March 5, 1879. *Wilcox* v. *Jackson,* 13 Pet. 498-517; Rev. Stat. U. S. 2387-2388-2389.

2—That private surveys such as they caused to be made prior to that date, conferred no right or title. *Smith* v. *United States,* 10 Pet. 334; *United States* v. *Hanson,* 16 Pet. 199; *Glenn* v. *United States,* 13 Pet. 256; *Mackay* v. *Dillon,* 4 How. 447; *Les Bois* v. *Bramell,* 4 How. 457.

3—That Section 3633, Compiled Laws Arizona, in so far as it attempts to change the trusts set forth in the patent (following the language of the Act of Congress) is simply inoperative, the legislature possessing no such power. *Wilcox* v. *Jackson,* 13 Pet. 517; *Winfield Town Co.* v. *Maris,* 11 Kan. 148; Organic Act.

That the mayor's deed to Clark is void will appear from the following considerations:

1—The trusts upon which the mayor held the townsite as set forth in Rev: Stat. U. S., Sec. 2387, is: "for the several use and benefit of the occupants thereof, according to their respective interests." The patent uses the word "inhabitants" instead of "occupants," but the words of the act would probably be held to control. If not, however, the change of the word cannot help the plaintiffs. This trust

has been passed upon in a number of cases, and it has been uniformly held that "occupants" meant actual *bona fide* occupants, and that none but such an occupant was entitled to a deed from the mayor. *Ricks* v. *Reed,* 19 Cal. 551; *Treadway* v. *Wilder,* 8 Nev. 98, 9 Nev. 67; *Lechler* v. *Chapin,* 12 Nev. 66; *Cofield* v. *McLellan,* 16 Wall. 331; *Hussy* v. *Smith,* 99 U. S. 20; *Stringfellow* v. *Cain,* 99 U. S. 610; *Folsom* v. *Dewey,* 103 U. S. 738.

It has always been held that the community at large are the beneficiaries of the trust as to the vacant and unimproved parts of the townsite. Cal., Hittel's Codes and Statutes (1876), Vol. 11, p. 1630, Sec. 15,996; Compiled Laws of Nev., Secs. 3863, 3869; *Windfield Town Co.* v. *Maris,* 11 Kan. 128; *Denver* v. *Kent,* 1 Colo. 336.

Section 2387 Rev. Stat. U. S. provides: "The execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sale thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

Section 2391 reads: "Any act of the trustee not made in conformity to the regulations alluded to in section 2387 shall be void."

The legislative authority of this Territory has not made any regulations "as to the disposal of the lots in said town, and therefore, the mayor's deed for the unoccupied lots is manifestly void." It was his duty to await the action of the legislature. *Denver* v. *Kent,* 1 Colo. 336.

Section 3633 Compiled Laws Arizona does not prescribe any regulations as to the disposal of lots, it simply disposes of them, something which all the cases agree the legislature has no power to do.

G. G. Berry, for Respondents.

A careful reading of the act will satisfy the Court at once that, in the judgment of the Territorial Legislature, there are no vacant or unoccupied lots in a town site after entry made and patent issued by the government; that all of the lands embraced in the patent are either actually or construc-

tively occupied. Citing Secs. 4, 5, 6, 7, 9, and 11 of the Townsite Act.

Section 11 of the Act, continuing in harmony with the preceding sections, provides that "All persons who select and lay out a townsite and their assigns, shall be deemed occupants thereof and of the lots embraced therein within the meaning of the above mentioned Act of Congress and deeds shall be made accordingly." The objection to this section of the act is, that it is an attempt on the part of the Legislature to define and construe the word occupant as used in the Act of Congress, so as to embrace a class not contemplated by that act, and to that extent is in conflict with the paramount law and therefore void. It is not contended, however, that the rights conferred upon these constructive occupants under the act in any way conflict with the rights of individual claimants who occupied townsite lands at the time of the entry, but they assert that all lands not actually occupied at the date of the entry belong to the community to be disposed of, and the proceeds to be applied to public uses. Section 12 of the Act of the Legislature provides that, "All moneys collected under the provisions of this act and not paid out for expenses, as herein provided, but remaining as surplus, shall be expended for the benefit of such town," etc. Moneys collected, here referred to, are such as would be received from the sale of lots, as provided in section 9, when the persons to whom they were allotted had failed to pay the tax assessed to them, but no provision is made in the act for the sale of VACANT lots, because, under the policy of the Territorial law, none existed. As the Act of Congress makes no provision for the disposal of vacant lands within a townsite, we fail to understand how a statute of the Territory, defining constructive occupancy of lands to which there is no other claimant, can be in conflict with the Act of Congress.

The idea of constructive occupancy has been in practice for years, and should not be abandoned as it prevents the success of the lawless element who would otherwise be jumping every attractive piece of land, made valuable by the labor of others and to which it had not contributed. The Territorial Legislature, having in view the preservation of

the peace and good order of the inhabitants of the new towns springing up within its borders, enacted section 11 of the Town Site Statute to enforce and effect the common usage so generally prevailing in all the States and Territories of the west and it only remains for the courts to enforce the law as written in the statutes.

BARNES, J.—This was a suit to recover six lots in the city of Tombstone, Cochise county. The case was tried by the court without a jury. The case comes up on the findings of the court below, and it is not necessary to look carefully into the evidence. Errors were assigned upon the admission of evidence, but, in the view we take of the case, it is not necessary to consider them.

The findings are that on March 20, 1880, the corporate authorities of the town of Tombstone, made application for a patent for lands for a town-site, as is provided in section 2387, Rev. St. U. S. On September 20, 1880, a patent was issued, which recites that the mayor and councilmen of the town of Tombstone, in trust for the several use and benefit of the inhabitants of the town, had purchased said premises; and the United States conveys and grants to Alder Abner Randall, mayor as aforesaid, in trust as aforesaid, and to his successors and assigns, in trust as aforesaid, subject to all the conditions contained in section 2387, *supra*; that on November 8, 1880, said Alder Abner Randall, mayor as aforesaid, duly executed a deed as such mayor, whereby he, for a valuable consideration, granted and conveyed unto James S. Clark, M. E. Clark, M. Gray, and John D. Rouse a large number of lots and blocks, situated on said Tombstone town-site, including the premises in controversy; that plaintiffs are grantees from the above grantees; that on the eight day of November, A. D., 1880, more than three-fourths of the lots within the town-site of Tombstone were wholly vacant, unoccupied and unimproved, and a number of the remaining lots had been improved by, and were in the actual occupation of, parties other than the grantees in said deed from Randall, mayor; that when defendant entered upon said lots sued for, the same were wholly vacant, unoccupied and unimproved, and that neither plaintiffs, nor any one

through whom they claim, had been in the actual occupation thereof; that as a matter of law, plaintiffs acquired the legal title to said premises by said deed of Randall, mayor, and had the right of possession; and that defendant never had any right in said premises.

The rights of the plaintiffs and this whole case hang on the validity of the deed from Randall, mayor. The deed is an indenture between the common council, the corporate authorities of the town of Tombstone, the parties of the first part, and J. S. Clark, M. E. Clark, M. Gray, and J. D. Rouse parties of the second part, and recites that Alder Randall was mayor, and Gray and others councilmen, when said deed was made; and that said grantees had claimed the lots thereinafter conveyed, and that they were the owners and occupants thereof; and in consideration of the premises, and of $5.80, granted, bargained and sold to the parties of the second part 2,168 lots out of the total 2,394, composing the whole town-site, to have and to hold the same, J. S. Clark, an undivided one fifth; M. E. Clark, two-fifths; J. D. Rouse, one-fifth; and M. Gray, one-fifth. Signed "ALDER RANDALL, MAYOR," etc.

The act of congress (Rev. St. U. S. § 2387) provides that the "corporate authorities" may enter at the proper land-office land settled and occupied, in trust for the several use and benefit of the occupants thereof; the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as the state or territory may by law provide. The deed by Randall, on its face, was a violation of the trust imposed upon him by law. Out of 2,394 lots he deeded 2,168 to four persons, not in severalty as occupants, but to them as tenants in common. The findings of the court show that at the time said deed was made three-fourths of the lots were vacant, including the lot sued for. The mayor held the title to these lots in trust for the occupants. He had no power to convey the title to anyone but to occupants. The legislature of the territory had the power to regulate the manner of disposal of the lots and the execution of the trust. But there was no power to change or alter the conditions of the trust. The very object and purpose of the law was to prevent any pri-

vate person or corporation from getting title to the lots included in such a town-site, and holding the same for purposes of speculation. If any profit was to accrue from the sale of such lots, it was carefully guarded for the benefit of the inhabitants of the town. Here was a bold attempt to transfer substantially this whole town-site to four persons which would enable them to speculate off of the present and future inhabitants of the town. It was a legal and actual fraud which ought not to be countenanced for a moment. The deed conveyed to parties no other title than Randall had, and so the title remained in whoever held the legal title in trust for the "several use and benefit of the occupants" of the said town.

Any act of the legislature which would create a breach of such trust is void. This same question was before the supreme court of Kansas in the cases of *Winfield Town Co. v. Maris* 11 Kan. 128, and *Independence Town Co.* v. *De Long,* 11 Kan. 153. In that state there existed the same statute as our section 11, *c.* 80, Comp. Laws, viz: "All persons who select and lay out a town-site, and their assigns, shall be deemed occupants thereof, and the lots embraced therein, within the meaning of the above-mentioned act of congress, and deeds shall be made accordingly." That court holds that, so far as that section gives a town company or persons who select and lay out a town-site any advantage over any other occupant, it is inoperative. "The legislature, in prescribing the rules for the execution of the trust, cannot change it by substituting other parties to receive its benefits than those indicated in the law of congress." If individuals or town companies choose to lay out lands for town-site, and make money by that means, there is no law to prevent it; but they cannot pre-empt the public domain for that purpose under the law of congress. That law was made for the benefit of the occupants of the town, and not for speculators. The law of congress has received a construction similar to that which we have given it, in the case of *Cash* v. *Spalding,* 6 Mich. 193; and while the court was divided on one of the questions raised, yet on this point both the opinion of the court and the dissenting opinion agree. Reference is made to *Leech* v. *Ranch,* 3 Minn. 448, (Gil. 332,) and *Castner* v. *Gunther,* 6 Minn.

135, (Gil. 63,) as making a different ruling; but the decisions do not sustain the opinion claimed for them. In the last-cited case the learned judge who delivered the opinion of the court states that he holds with the decision in Michigan, but that point was not before the court.

The judgment of the court below is reversed.

[Civil No. 160. Filed July 9, 1886.]

[S. C. 11 Pac. 314.]

T. L. STILES, Assignee, Plaintiff and Respondent, v. ANNIE E. LORD, Defendant and Appellant.

1. HUSBAND AND WIFE—POWER OF MARRIED WOMEN TO CONTRACT—EMANCIPATED IN 1864 BY COMP. LAWS 1877, p. 327, par. 1960, 1961, 1962, and 1963—REPEALED BY IMPLICATION IN 1865 BY COMP. LAWS 1877, p. 328-332, par. 1967-1999, WHICH ENACTED THE COMMUNITY SYSTEM—REPEALED IN PART IN 1871 BY COMP. LAWS, p. 332, par. 2000, WHICH PROVIDES MARRIED WOMEN SHALL HAVE EXCLUSIVE CONTROL OF SEPARATE PROPERTY—MILLER v. FISHER, 1 ARIZ. 232, 25 Pac. 651, CRITICIZED AND DISTINGUISHED—ACT OF 1865 AND 1871 TO BE CONSTRUED TOGETHER WITHOUT REGARD TO ACT OF 1864 REPEALED—WOFFENDEN v. CHAROULEAU, ANTE, 91, 11 Pac. Rep. 117, CHAROULEAU v. WOFFENDEN, 1 ARIZ. 243, 25 Pac. Rep. 652, AND WOFFENDEN v. CHAROULEAU, 1 ARIZ. 346, 25 Pac. Rep. 662, CITED AND APPROVED.—In 1864 (Comp. Laws, 1877, 327) was enacted chapter 32 of the Compiled Laws, *supra*, which completely emancipated a married woman, but in 1865, *supra*, there was enacted "An act amendatory of chapter 32, Howell Code," which, although it does not in terms amend the former law, and has no repealing clause, is a complete code of the law of husband and wife, so far as their property is concerned, and must be held to repeal the act of 1864 by implication. This statute enacted for this territory the community system—*communio bonorum*— which is founded in the civil law It has no dower or courtesy. By that law the property of husband and wife owned before marriage, or acquired thereafter by gift, etc., is separate property; all property acquired after marriage other than by gift, etc., is common property; the husband has power of management and control of separate property of wife but cannot sell it except by writing signed by both husband and wife, and has entire management and control of common property, with absolute power of sale and the rents and profits of separate

property become common property. This system, established in 1865, remained unchanged until 1871, when the statute, *supra*, which provides that "married women of the age of twenty-one years and upwards shall have the sole and exclusive control of their separate property;" and may convey lands without being joined by their husbands, was passed, repealing so much of the act of 1865 as is in conflict with it, and no more. *Miller* v. *Fisher*, *supra*, approved in holding that married woman may make valid contract for sale of personal property; and disapproved in reasoning that the act of 1871 by repealing part of act of 1865 thereby revived the act of 1864; *Held*, that act of 1865 and 1871 must be construed together without regard to the act of 1864, which must rest repealed. *Woffenden* v. *Charouleau* cases, *supra*, approved in holding that the rents and profits of the separate estate of the wife are her separate property.

2. SAME—POWER OF MARRIED WOMAN TO CONTRACT—UNDER ACT OF 1871 MAY SELL LAND OR PERSONALTY BELONGING TO SEPARATE ESTATE—NEGOTIABLE INSTRUMENTS—MARRIED WOMAN, UNDER ACT SUPRA, HAS NO POWER TO MAKE CONTRACT OF INDORSEMENT—MAY NOT MAKE CONTRACT OF GUARANTY—MARRIED WOMEN'S ACTS TO BE LIBERALLY CONSTRUED—STATUTE DOES NOT EMPOWER HER TO CONTRACT GENERALLY.—Under act of 1871 a married woman has the power to sell her separate property without her husband joining. It is not necessary to the transfer of a promissory note that she have the power to enter into contract of indorsement, and under such statute a wife's indorsement of a bill or note is inoperative beyond divesting her of her title therein. Neither may she make a contract of suretyship or guaranty. Married women's acts are to be construed liberally, to further the objects to be attained. But the law does not empower her to contract generally and it cannot be extended to the making of contract of endorsement.

APPEAL from a judgment of the County Court in and for the County of Pima. Reversed.

The facts are stated in the opinion.

Hoover & Satterwhite, for Appellant.

Act of 1871, Comp. Laws, 332, provides that, "Married women of the age of 21 years and upward shall have the sole and exclusive control of their separate property; and may convey and transfer lands or any estate or interest therein, vested in or held by them in their own right and without

being joined by the husband in such conveyance as fully and perfectly as they might do if unmarried."

It is absolutely certain that this section does not attempt to change the rule as to transfer of personal property, so with the latter portion of the provision we have nothing to do. The first clause vests in her the control of all her property; it cannot be claimed that the word control includes a right of conveyance or of transfer, it is used in the limited sense of being synonymous with management, otherwise an express power to convey real property would not have been necessary, for if the word imports the right to transfer personal property, it would also import the right to convey real property.

An examination of Married Women's Statutes shows that the word control has never been used in any broader sense than that above stated, and that no power of sale, transfer, or warranty of real estate, or guaranty of personal property has ever been held to be created by implication. The only exception to this is the case of *Miller* v. *Fisher,* 1st Arizona. This case has neither law, precedent nor reason to support it.

All that the act of 1871 attempts to do is to transfer this right of "management and control" from the husband to the wife and in addition thereto to give to the wife the right of alienation as to real property. This is all that it does. The old section is repealed *pro tanto,* but this does not leave in the wife any right to alienate personal property any greater than she had before and most certainly vests in her no right whatever to contract, and it is upon an executory contract made by her that plaintiff seeks to recover.

The doctrine of repeal by implication absolutely prevents the revival of the original statute. The reason that the statute is repealed by implication is because the new Act being inconsistent with the old, supplants it, standing in its place.

J. A. Anderson and John Haynes, for Respondent.

The law governing this question, and regulating the present *status* of the married woman, is the first section of the Act of 1864 (Compiled Laws, page 327), and the Act of 1871 (Compiled Laws, page 332); *Miller* v. *Fisher,* 1 Ariz. 232, 236,

25 Pac. 651; *Charouleau* v. *Woffenden,* 1 Ariz. 243, 258, 262, 25 Pac. 652; *Glover* v. *Alcott,* 11 Mich. 489.

This contract of endorsement is not an independent contract aside from and without reference to her separate property, but is in and about her separate property and for its benefit, and a means of selling and disposing of it to the best advantage, and "in the same manner" and "on the same footing" as other persons can. *Russel* v. *People's Savings Bank,* 39 Mich. 671, 33 Am. Rep. 444; *Alexander* v. *Bouton,* 55 Cal. 15; *Marlow* v. *Barlew,* 53 Cal. 456; Schouler on Husband and Wife, page 304, par. 258.

The Act of 1865 does not repeal, but substitutes for the Act of 1864. Section 6 of the Act of 1865 is substituted for the latter portion of the First Section of the Act of 1864. Section 6, of Act of 1865, is repealed by Act of 1871, and the latter portion of the First Section of the Act of 1864 is restored to its full vigor. In other words, the latter portion of the Act of 1864 gave the wife the right to sell, contract and transfer her separate property the same as if she were a *feme sole;* the sixth section took this right away from her and gave it to husband and wife jointly. The Act of 1871 repealed the sixth section of 1865, by reinstating the wife in the absolute control of it. To sell property and contract in reference thereto is a necessary incident to the "sole and exclusive control" of it.

BARNES, J.—Plaintiff sued defendant on a contract of indorsement of a promissory note executed by Alexander Levin and Zenona Levin, and payable to the order of defendant, and indorsed and transferred by her, before maturity, for a valuable consideration. The record shows that at the time of the execution and delivery of this note to defendant, and the indorsement by her, she was a married woman, and that she still is such; that the said note was of her separate estate. The sole question presented is whether she is liable on said contract of indorsement. This must be determined by an examination of the statutes of this territory.

In 1864 (Comp. Laws, 327) was enacted chapter 32 of the Compiled Laws. It is as follows: "The real and personal estate of every female acquired before marriage, and all

property real and personal to which she may afterwards become entitled, by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female; and shall not be liable for the debts, obligations or engagements of her husband; and may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her in the same manner, and with the like effect, as if she were unmarried." Section 2 provides that any trustee of any married woman may convey to her, and pay to her, rents and profits, for her sole use and benefit. Section 3 provides that suits may be brought by and against her as if she were sole. Section 4 provides that her husband shall not be liable for her contracts. This completely emancipated her.

In 1865 (Comp. Laws, 328) there was enacted "An act amendatory of chapter 32, How. Code." The act consists of 33 sections. It does not in terms amend any particular section or clause in the former law, and has no repealing clause. It is a complete code of the law of husband and wife, so far as their property is concerned, and must be held to constitute the body of the law on that subject, and to take the place of the act of 1864, and to repeal it by implication. This law enacted for this territory the community system,—*communio bonorum*,—which, founded in the civil law, prevailed in France and among the Spanish people, and was brought over to the new world by them, and found its way to Mexico, Louisiana, Florida, and has spread to California, Texas, Arizona and New Mexico, and there takes the place of the common law. *Packard* v. *Arellanes*, 17 Cal. 537; *Burr* v. *Wilson*, 18 Tex. 370.

It has no dower or courtesy. By that law the property of husband and wife owned before marriage, or acquired thereafter by gift, bequest or devise, or descent, shall be the separate property of each; and all property acquired after marriage other than by gift, etc., shall be the common property. The common law knows no such title to property. The husband had power to "manage and control" the separate property of the wife, but could not sell or incumber, except by a writing signed by both husband and wife. *O'Brien* v. *Foreman*, 46 Cal. 81. The husband had entire management and control

of the common property, with absolute power of sale, and the rents, and profits of separate property become common property. *Scott* v. *Ward*, 13 Cal. 471; *Noe* v. *Card*, 14 Cal. 577; *Fuller* v. *Ferguson*, 26 Cal. 556; *Wilson* v. *Castro*, 31 Cal. 421; *Yates* v. *Houston*, 3 Tex. 452; *Wilkinson* v. *Wilkinson*, 20 Tex. 242; *Wright* v. *Hays*, 10 Tex. 133, 6 Am. Dec. 200; I Burge, Col. Law, 202; *Childress* v. *Cutter*, 16 Mo. 24.

This was the system established by the law of 1865, and it remained unchanged until 1871, when was enacted the law which provides (Comp. Laws, 332) that "married women of the age of twenty-one years and upwards shall have the sole and exclusive control of their separate property; and may convey, etc., "lands," etc., "without being joined by the husband, as fully and perfectly as they might do if unmarried." This law repeals so much of the law of 1865 as is in conflict with it, and no more. While we concur with *Miller* v. *Fisher*, 1 Ariz. 232, 25 Pac. 651, in holding that a married woman may make a valid contract for the sale of personal property, which was the only question before the court, we cannot concur with the reasoning of that case that the act of 1871, by repealing section 62 of the act of 1865 as in conflict with it, *ex vi termini* revives the act of 1864; but hold, rather, that the act of 1865 and the act of 1871 must be construed together, without regard to the act of 1864, which must rest as repealed. We held at this term (*Woffenden* v. *Charouleau*, ante p. 91, 11 Pac. 117) that the rents and profits of the separate estate of the wife and her separate property, as was held in *Charouleau* v. *Woffenden*, 1 Ariz. 243, 25 Pac. 652, and in *Woffenden* v. *Charouleau*, 1 Ariz. 346, 25 Pac. 662. *Miller* v. *Fisher*, 1 Ariz. 232, 25 Pac. 651, held that she might make a valid contract of the sale of her separate personal property. But may she make any kind of contract of sale? At common law a married woman could not make a valid contract at all binding her. What power she now here has to contract must be found in the words of the act of 1871. The words are: she "shall have the sole and exclusive control" of her separate estate. By the act of 1865, *supra*, the husband had the "management and control" of this property, and he might not sell it except by instrument in writing signed by him and her. To that extent—that is,

to the extent of contracting as to the sale of her separate property in writing jointly with her husband—she had the power to contract given by the act of 1865, but no further. The act of 1871, giving her the sole and exclusive control of her separate property, is held to have enabled her to sell without her husband jointly, and without doing so in writing, as to her personal property.

We are now asked to say that if she sells a *chose in action*, that is, a promissory note,—and indorses it with her name, that she has not only sold the note, and made a valid transfer of the same, but that, in addition thereto, she has made a contract of indorsement according to the custom of merchants; and that if the note be not paid by the maker, that recovery can be had against her on such contract of indorsement. We are not prepared to go that far. We think the former cases have gone far enough. It would be a long stretch of construction to say that the word "control" is to be held to repeal the common law, which prohibits a wife from making any contract, and to enable her to make any sort of a contract, so that it be as to her "separate property." This would be nothing more or less than judicial legislation. To hold that she may make a simple contract of sale of her separate property seems a necessary incident to the "control" of her property. Somebody should have this power. The act of 1865 gave it to both jointly, and it is fair construction to hold that the act of 1871 gave this power to her; but we are not prepared to extend it beyond such a simple contract as if necessary to the sale of personal property. The contract of indorsement is not a necessary or essential contract for the sale of a promissory note. She may transfer her title without making this contract of guaranty. The argument of convenience so forcibly urged cannot help us to construe a statute. That is an argument to be addressed to the law-making power.

The state of New York, in 1848-49, enacted one of the first of the modern married women's statutes. That provides that any married woman may take by inheritance, gift, etc., and hold to her sole and separate use, and convey and devise, real and personal estate. In the case of *Yale* v. *Dederer*, 18 N. Y. 265, 72 Am. Dec. 503, that law came before the

courts of that state for construction, and that is the leading case on the subject. In that case a married woman had executed a promissory note, with her husband as his surety. The court held that the contract was void, and that it could not be made a charge upon her separate estate in equity. The learned justice in his opinion says: "A married woman may 'convey and devise' real and personal property as if she were unmarried. I think it is plain, however, that the statute does not remove the incapacity which prevents her from contracting. She may convey and devise her real and personal estate, but her promissory note, or other personal engagement, is void, as it always was, by the rules of the common law." The case was again before that court, (22 N. Y. 450, 78 Am. Dec. 216,) and in a very able opinion by Shelden the doctrine of the case was again declared. This case created a profound impression, provoked much discussion, and was met with serious dissent, not so much however, as to its construction of the statute, as its refusal to make the debt an equitable charge upon her separate estate. *Todd* v. *Lee,* 15 Wis. 400; *Grapengether* v. *Fejervary,* 9 Iowa, 163. 74 Amer. Dec. 336; *Mayo* v. *Hutchinson,* 57 Me. 546; *Cummings* v. *Sharpe,* 21 Ind. 331; *Major* v. *Symmes,* 19 Ind. 117; *Miller* v. *Newton,* 23 Cal. 554; *Glass* v. *Warwick,* 40 Pa. St. 140, 80 Amer. Dec. 566.

The supreme court of Massachusetts (*Willard* v. *Eastham,* 15 Gray, 328, 79 Amer. Dec. 366) came to the support of New York in a similar case in a very able opinion, and the current of decision seems to have been turned. *Perkins* v. *Elliott,* 22 N. J. Eq. 127; *Cozzens* v. *Whitney,* 3 R. I. 79; *Jones* v. *Crosthwaite,* 17 Iowa, 393; *Maguire* v. *Maguire,* 3 Mo. App. 458; *Hudson* v. *Davis,* 43 Ind. 258; *Chatterton* v. *Young,* 2 Tenn. Ch. 768; *Nelson* v. *Miller,* 52 Miss. 410; *Maclay* v. *Love,* 25 Cal. 368, 85 Amer. Dec. 133; *Veal* v. *Hurt,* 63 Ga. 728; *Saulsbury* v. *Weaver,* 59 Ga. 254; *Robertson* v. *Wilburn,* I Lea, 633; *State Savings Bank* v. *Scott,* 10 Neb. 83; 4 N. W. 314; *Harris* v. *Finberg,* 46 Tex. 79.

If the words "convey and devise," which give to a married woman the power of disposing of and selling her real and personal estate, do not empower her to make a valid promissory note or other personal engagement, it cannot be con-

tended that the words "use and control" in our statute do so. It was held in Indiana (*Moreau* v. *Branson*, 37 Ind. 195) that, under such statutes a wife's indorsement of a bill or note is inoperative beyond divesting her of her title therein. This is exactly our position in this case. Neither may she make a contract of suretyship or guaranty. *Russel* v. *Bank*, 39 Mich. 671, 33 Am. Rep. 444; *Perkins* v. *Elliott*, 22 N. J. Eq. 127; *Kohn* v. *Russell*, 91 Ill. 138; *Dunbar* v. *Mize*, 53 Ga. 435.

These married women's acts are to be construed liberally, to further the object to be obtained. In this territory the object plainly was to give to her the use and benefit of her separate property controlled by herself. Whatever powers are a fair and necessary incident to such use and control were given to her. But the law did not empower her to contract generally. The contract of indorsement is not necessary to a sale or transfer of a promissory note, and we cannot, by construction, extend it that far.

Judgment reversed and cause remanded.

[Civil No. 143. Filed July 9, 1886.]

[S. C. 11 Pac. 351.]

THOMAS J. JEFFORDS, Plaintiff and Appellant, v. CHARLES F. HINE, Defendant and Respondent.

1. PUBLIC LANDS—LAND OFFICE—POWER OF COURT TO REVIEW ACTION OF IN GRANTING PATENT LIMITED—COURT OF EQUITY MAY GRANT RELIEF IN CASES OF FRAUD UPON CONTESTANT OR DEPARTMENT OR MISTAKE OF LAW BY DEPARTMENT.—Where there has been a contest over issuance of patent and the land department has determined that patent shall issue to one of the contestants the courts have no right or power to interfere unless it can be shown that fraud or imposition was practiced upon the complaining contestant, or upon the land department, or that its officers have clearly mistaken the law applicable to the case.

2. SAME—SAME—FINDINGS OF FACT BY DEPARTMENT CONCLUSIVE UPON COURTS.—The land department is a tribunal, appointed by Congress to decide questions like this, and when finally decided by the officers

of that department the decision is conclusive everywhere else, as regards questions of facts.

3. SAME—SAME—FINDING THAT OFFICER IS SUCH DE FACTO IS MIXED FINDING OF LAW AND OF FACT—RECEIVER AS DE FACTO REGISTER—WHAT CONSTITUTES INCUMBENT OFFICER DE FACTO—RIGHT TO OFFICE CANNOT BE TRIED COLLATERALLY—ACTS OF DE FACTO OFFICER VALID.—The question whether Daly, receiver, was the register *de facto* was before the department, and if not purely a question of law or of fact, it was clearly a mixed question of law and fact, and when decided, was at rest under the decisions cited. Where under some designation the receiver undertook to exercise, and did exercise and discharge the duties and powers of register, his absolute legal right to the office cannot be tried in a collateral manner between third parties. Whatever might be said of the acts of a mere intruder, without any claim or color of title, it is well settled that when a person actually obtains an office, with the legal *indicia* of title until ousted, his official acts are as valid as if his title were not disputed.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Affirmed.

The facts are stated in the opinion.

Smith & Campbell, and C. C. Stephens, for Appellant.

Thos. Mitchell, for Respondent.

SHIELDS, C. J.—This controversy as to a right of possession and ownership of a certain mining property in Tombstone mining district, Cochise county. The contention was commenced and continued for years in the land department of the United States, and has finally been transferred to the courts of this territory. It is not deemed necessary or important to refer with particularity in this case to the history of such controversy, so carried on, but simply to state certain well-established facts, which will explain our decision, and show upon what ground it rests.

In November, 1875, the plaintiff undertook to locate, and claims to have done so, the mining property in question, giving thereto the name of the "Bronkow Mine." He had the mine surveyed, and in other things claims to have complied

with the laws relative to the location of mines. While the plaintiff was taking the various steps to procure a patent, and on October 4, 1880, the register of the United States land-office at Tucson was suspended by order of the president of the United States. No successor to such register was regularly appointed by the president until May, 1881, but in the meantime C. E. Daly, who was at that time receiver of public moneys of the local land-office at Tucson, assumed also to act as register of the land-office, claiming authority to do so by a communication or order from the land-office in Washington. The receiver named continued to act as register, and discharged the duties of said office, from the time of the suspension of the register up to November 16, 1880, when the commissioner of the general land-office at Washington informed him that it was not lawful for him to perform the functions and duties of register. When the successor to the suspended register was appointed, plaintiff and his application for patent, and the proofs accompanying same, submitted to the newly-appointed register, who approved the same, and ordered publication to be made, which was done. The plaintiff claims that from thenceforward his proceedings were such as to entitle him to a patent.

The rights of the defendants arise as follows: While Daly was acting as register the defendants, acting upon the theory that plaintiffs had abandoned the property in question, filed in the land-office at Tucson an application for a patent for the same mining claim in question, but by the name of the "Dean Richmond Claim." Daly, acting as said register, and before the receipt by him of the notification that he had no right to act, ordered the publication of the notice of defendants for a patent to said Dean Richmond claim. To this application the plaintiff filed no adverse claim, presumably acting on the belief that Daly was a mere usurper, and without any authority to do anything of the kind whatever as register.

On May 18, 1881, as stated, the successor of the suspended register was appointed, and entered upon his duties, and on that day ordered a publication of the application of the plaintiffs for a patent to the Bronkow mine. August 12, 1881, the defendants filed in the local land-office a motion to set

aside such action as the register in ordering such publication. This motion was denied by the register, and the defendants appealed therefrom to the commissioner of the general land-office at Washington. On the hearing of this appeal the commissioner reversed the decision of the register of the land-office at Tucson, and ordered that the motion of the defendants there made, to set aside the order of the register directing the publication of the plaintiff's notice of application for a patent to the Bronkow mine, be granted. The commissioner seems to have passed fully and squarely upon all questions then in controversy between the parties, holding that the Bronkow application, although first presented, was of no effect *against*, and opposed no bar to, the reception of the application for the Dean Richmond; also that the Bronkow application was subsequent to that of the Dean Richmond; and further decided that C. E. Daly, when he acted as register, was a *de facto* officer, and that the publication ordered by him while acting as register of the local land office was a legal publication, and that the rights of the plaintiff were concluded by such publication. The result was that the defendants, the claimants of the Dean Richmond lode, were directed by the commissioner of the land-office to complete their entry. From this decision the plaintiff appealed in due time to the secretary of the interior department. The secretary of the interior, upon the hearing before him, in all things affirmed the decision of the commissioner of the land-office, and ordered that the defendants, as such claimants of the Dean Richmond, should be permitted to complete their entry, and that a patent issue to them for the Dean Richmond claim, which covered the Bronkow location. After such action and decision of the secretary of the interior the complaint in this case was filed in the district court in and for Pima county.

The complaint in the case asks a rehearing of the whole controversy, upon the ground that the land department of the government erred in its decision, and especially in holding that the application tendered by the defendants was proper, and in allowing them to complete their entry. It is also said to have been error on the part of the land depart-

ment to hold that Daly was, at the time he took the steps referred to, a *de facto* officer; and also in holding that the Bronkow application was subsequent to that of the Dean Richmond. Other errors are said to have been committed by the land department, but these are the essential ones, and all that require consideration. The complaint prays that a decree be rendered that the complainant is an equitable owner of the land in controversy, and that the defendants be held to be trustees of the legal title for the benefit of the plaintiffs, and that they be required to deed and convey the premises to the plaintiff. A decree was rendered in the court below dismissing the complaint, and appeal has been taken to this court.

It will be seen, at a glance, that we are asked to review the action of the land department of the United States, and, indeed, to reverse and set aside the action of such department. It has been so often and repeatedly held that the courts have no right or power to so interfere in cases of this kind, after the action of the land department, that little else need be done in disposing of this case than to refer to the decisions made by the highest judicial tribunal in the country upon the subject. The questions that we are asked now to look into and decide were examined and passed upon by the land department, and, after such examination, it was decided that the patent to the property should issue to the defendants. The power of the land department to make such a decision is unquestionable. The United States, in thus making a title to the land in question, had a right to determine upon the sufficiency of whatever went to entitle the claimants to the patent actually granted, and the lands named by that conveyance; and, the patent having been granted to the defendants, it cannot be said that such patent was issued improperly, unless it can also be shown that fraud or imposition was practiced upon the plaintiffs, or upon the land department, or that such officers have clearly mistaken the law applicable to the case.

In *Baldwin* v. *Starks*, 107 U. S. 463, 2 Sup. Ct. Rep. 473, the law is clearly stated: "It has been so repeatedly decided in this court, in cases of this character, that the land department is a tribunal, appointed by congress to decide

questions like this, and when finally decided by the offiecrs of that department the decision is conclusive everywhere else, as regards all questions of fact, that it is useless to consider the point further. Where fraud or imposition has been practiced on the party interested, or on the officers of the law, or where these latter have clearly mistaken the law of the case as applicable to the facts, courts of equity may give relief; but they are not authorized to re-examine into a mere question of fact, dependent on conflicting evidence, and to review the weight which those officers attached to such evidence." Of like import are the decisions of *Johnson* v. *Towsley*, 13 Wall. 72; *Shepley* v. *Cowan*, 91 U. S. 330; *Marquez* v. *Frisbie*, 101 U. S. 473; *Quinby* v. *Conlan*, 104 U. S. 420; *Lee* v. *Johnson*, 116 U. S. 48, 6 Sup. Ct. Rep. 249.

The question is very fully discussed in *Quinby* v. *Conlan*, where it was held that rulings upon matters of fact or upon mixed questions of law and fact, which were properly cognizable by the land department, and passed upon by it, are put beyond the interference of the courts; and in this regard it is said: "The proofs offered in compliance with the law are to be presented in the first instance to the officers of the district where the land is situated, and from their decision and appeal lies to the commissioner of the general land-office, and from him to the secretary of the interior. For mere errors of judgment as to the weight of evidence on these subjects by any of the subordinate officers the only remedy is by appeal to his superior of the department. The courts cannot exercise any direct appellate jurisdiction over the decisions of those officers, nor can they reverse or correct them in a collateral proceeding between private parties. * * * It is only when those officers have misconstrued the law applicable to the case as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere, and refuse to give effect to their action. On this subject we have repeatedly, and with emphasis, expressed our opinion, and the matter should be deemed settled."

In *Lee* v. *Johnson*, 116 U. S. 48, 6 Sup. Ct. Rep. 249, it is said: "The patent having been issued by the officers of the land department, to whose supervision and control are intrusted the various proceedings required for the alienation of the public lands, all reasonable presumptions are indulged in support of their action. It cannot be attacked collaterally, but only by a direct proceeding, instituted by the government, or parties acting in its name, and by its authority. If, however, those officers mistake the law applicable to the facts, or misconstrue the statutes, and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake, and compel the transfer of the legal title to him as the true owner. The court, in such case, merely directs that to be done which those officers would have done if no error of law had been committed. The court does not interfere with the title of a patentee, when the alleged mistake relates to a matter of fact, concerning which those officers may have drawn wrong conclusions from the testimony. A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which congress has developed exclusively upon the department."

But it is alleged, in avoidance of the law here stated, that there was a mistake of law by the officers of the land department in holding that Daly was an officer *de facto*. This question was fully before the department, and received ample consideration, and, if not purely a question of law or of fact, it was clearly a mixed question of law and fact, which, under the decisions cited, must be regarded as at rest by the decision pronounced. We have no doubt, however, that the decision was right in point of law. It is undisputed that, by virtue of some sort of designation by the land department, Daly undertook to exercise, and did exercise and discharge, the duties and powers of register. He seems to have been an actual incumbent of the office, and his absolute legal right cannot be tried in this collateral manner, and between third parties. There was ample proof of user on his part, and that he was acting as register, and apparently, for the time being, in full enjoyment of the office. That was enough to make valid his action in this case. Whatever may be said of the acts of a mere intruder, without any claim or color of title,

it is well settled that a person actually obtaining an office, with the legal *indicia* of title, is a legal officer, until ousted, so far as his official acts are concerned, they are as valid as if his title were not disputed. The public have an interest in the continuous and unbroken discharge of official duty, and the necessities thereof, and cannot wait to try the title of conflicting claimants to an office. For this reason it has come to be held, so often as to be now settled, that the official acts of the incumbent of an office, with whom alone the public can, under the circumstances, transact business, shall be regarded as legal. The affairs of society could not be carried on in any other way than by treating as valid the official acts of person *de facto* in office. Upon this point, see the following authorities: *Facey* v. *Fuller*, 13 Mich. 527; *Keator* v. *People*, 32 Mich. 484; *Matter of Corrigan*, 37 Mich. 66; *State* v. *Williams*, 5 Wis. 308, 68 Amer. Dec. 65; *Green* v. *Burke*, 23 Wend. 502; *People* v. *White*, 24 Wend. 529; *Baird* v. *Bank of Washington*, 11 Serg. & R. 413; *Gurley* v. *Hawkins*, 2 Clark, 175; *Druse* v. *Wheeler*, 22 Mich. 439.

The result is that the decree of the court below will be affirmed.

[Civil No. 133. Filed August 2, 1886.]

[S. C. 11 Pac. 396.]

THE COPPER QUEEN MINING COMPANY, Plaintiff and Appellant, v. THE ARIZONA PRINCE COPPER COMPANY, Defendant and Respondent.

1. APPEAL AND ERROR—REHEARING—PRACTICE—WHEN REFUSED—PURPOSE OF—ARGUMENT ON CONFINED TO POINTS RAISED IN PETITION FOR.—Where neither the petition for rehearing nor the argument thereon points out any misapprehension of the record or mistake of law, this court will decline to review its former decision. It is not the office or purpose of a rehearing to reopen the whole cause, and to require of the court a reconsideration thereof. Argument of points not included in the petition for rehearing is bad practice. A petition for a rehearing should state particularly the ground

upon which it is asked, and if granted, the argument should be confined to those grounds.

ON. REHEARING—FORMER OPINION, ANTE, 10.

DISMISSED ON MOTION.—127 U. S. 782; 32 Law Ed. 331.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Cochise. Affirmed..

The facts are stated in the opinion.

John Haynes and W. H. Stilwell, and Lewis & Dibble, for Appellant.

Campbell, Williams, and Robinson, for Respondent.

BARNES, J.—This was an action of ejectment to recover possession of mining ground. The cause was tried below by the court and jury, and a verdict was rendered for plaintiff, and judgment accordingly. The defendant moved for a new trial, which was overruled, and he appealed to this court. The cause was submitted to the January term, A. D., 1885, of this court, and the judgment was affirmed. *Arizona Prince Copper Company* v. *Copper Queen Mining Company, Ante* 210, 7 Pac. 718. Defendant petitioned this court for a rehearing of the cause, which was granted, and the case was re-argued, and again submitted. Neither the petition itself, nor the argument of the case, point out any misapprehension of the record by this court, or any mistake in the law of the case. Every question urged upon us was submitted and considered by the court on the former hearing. We are, in effect, asked to review that decision of this court. This we decline to do. It is not the office or purpose of a rehearing to reopen the whole cause, and to require of the court a reconsideration of the whole case. Were this precedent to be established, it would open the doors for petitions for rehearing of all causes, and we should expect them more particularly when the persons who compose the court have been changed. On the argument of the cause many points have

been urged upon the attention of the court, which were not included in the petition for rehearing. This we regard as bad practice. A petition for a rehearing should state particularly the ground upon which it is asked, and, if granted, the argument should be confined to those grounds. *Dougherty* v. *Henarie*, 49 Cal. 686; *Grogan* v. *Ruckle*, 1 Cal. 193; *Willson* v. *Broder*, 24 Cal. 190; *Knoth* v. *Barclay*, 8 Colo. 305, 7 Pac. 289; *Hawley* v. *Simmons*, 101 Ill. 654, and see *Munger* v. *Jacobson*, 100 Ill. 468, and *Furlong* v. *Riley*, 104 Ill. 97; *Rogers* v. *Laytin*, 81 N. Y. 642. But the importance of the case, and the ability with which it has been presented, have induced us to go into this record to see if the appellant has lost any substantial right by the former decision of this court. The printed record is very voluminous,—over 700 pages,—and we have carefully read and examined all of it, and we adhere to the conclusions of this court on its former hearing. We cannot say that the evidence does not sustain the verdict, nor can we say that the improper conduct of the jury, as shown by the record, is such as to require their verdict to be set aside. Neither do we think that the judgment is broader than the pleadings allow. These are the points argued. We do not think anything is to be gained by our again reviewing the case at large. That was sufficiently done in the former opinion of this court. Judgment affirmed.

Shields, C. J., and Porter, J., concur.

[Civil No. 148. Filed August 2, 1886.]

[S. C. 11 Pac. 545.]

JAMES HOBSON, Plaintiff and Respondent, v. THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, Defendant and Appellant.

1. PROCESS—DEFECTIVE SERVICE WAIVED BY FILING OF ANSWER.—A party having answered, and having had his day in court, should not be allowed to reverse all the procedings because of irregularity in service.

2. APPEAL AND ERROR—HARMLESS TECHNICAL ERROR WILL NOT BE PERMITTED TO WORK REVERSAL.—It is a general rule that wherever and whenever substantial justice is secured, a mere technical error, which is harmless in character, and which has worked no injury, will not be permitted to defeat or annul the final conclusion or consummation of judicial proceedings.

3. BOND IN ACTIONS FOR TORT—FILING BY LEAVE OF COURT—ACT OF MARCH 8, 1883.—Where a statute, *supra*, was passed within four days prior to the commencement of suit, requiring filing of bond for costs at beginning of actions for torts, it was not error for court to grant leave to file bond thereafter.

4. CONTINUANCE—ABSENCE OF WITNESSES—MOTION FOR CONTINUANCE PROPERLY OVERRULED WHERE PARTY ADMITS UNDER STATUTE THAT WITNESS IF PRESENT WOULD TESTIFY AS STATED IN AFFIDAVITS FOR CONTINUANCE—COMP. LAWS, 1877, c. 48, p. 433, §160, CITED.—The motion for continuance on account of absence of witnesses was properly overruled, inasmuch as plaintiff admitted that the witnesses, if present, would testify to the facts stated in the affidavit. Statute cited, *supra*.

5. NEGLIGENCE—PLAINTIFF GUILTY OF DANGEROUS ACT—SUCH ADMITTED FACT DOES NOT DEPRIVE HIM OF RIGHT TO HAVE CASE SUBMITTED TO JURY—GENERAL RULE AS TO WHAT ADMITTED FACTS ARE FOR THE JUDGMENT OF COURT—WHERE ULTIMATE FACT TO BE PROVEN IS TO BE DEDUCED FROM ADMITTED FACTS, CASE SHOULD GO TO JURY—MOTION FOR NON-SUIT PROPERLY DENIED.—Quere, whether the plaintiff, in getting upon the car, as stated by himself, was guilty of an act evidently dangerous, and in so doing was guilty of such negligence as should preclude him from having a verdict as a matter of law? It is true, in many cases, that, where the facts are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question, rather than where deduction or inferences are to be made from the facts. In some cases, too, the necessary inference from the proof is so certain that it may be ruled upon as a question of law. Extreme cases cited. The range between them is almost infinite in variety and extent. Upon the facts proven in such cases it is a matter of judgment and discretion—or sound inference—what is the deduction to be drawn from the undisputed facts. It is this class of cases and those akin to it, that the law commits to the jury. Held that this case should have gone to the jury, and that the motion for non-suit was properly denied.

6. SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF OF ON DE-

FENDANT—PLAINTIFF MUST ESTABLISH CULPABILITY OF DEFENDANT BUT NEED NOT PROVE HIS OWN CONDUCT TO HAVE BEEN PRUDENT —ABSENCE OF FAULT ON PART OF PLAINTIFF MAY BE INFERRED FROM CIRCUMSTANCES AND DISPOSITION OF MAN TO KEEP OUT OF DANGER.—Plaintiff having made a *prima facie* case, it was incumbent on defendant to prove a want of care on plaintiff's part to defeat the action. It is not a rule of universal application that the plaintiff must prove affirmatively that his conduct on the occasion of the injury was cautious and prudent. The culpability of the defendant must be proved affirmatively before the case can go to the jury; but the absence of any fault on the part of the plaintiff may be inferred from circumstances, and the disposition of men to take care of themselves, and keep out of difficulty, may properly be taken into consideration.

7. FELLOW SERVANTS—LOCOMOTIVE ENGINEER AND TEAMSTER WORKING ON GRADE—INSTRUCTIONS TO JURY CONCERNING.—Where the plaintiff's business was only to drive teams from the end of the line for the distribution of ties, and his work was not directly connected with the locomotive engineer, and he had nothing whatever to do with him save to be taken to and from his dinner under orders of his superior, he and the engineer were not fellow servants within the rule exempting the common employer from liability. Instructions to jury concerning the issue as to whether plaintiff and engineer were fellow servants reviewed and held correct.

8. DAMAGES—$15,000 NOT EXCESSIVE—PRACTICE—REMISSION FROM JUDGMENT.—Where verdict and judgment were for $30,000, and on motion for new trial the court was of opinion that it was excessive to the amount of $15,000, and that sum, in open court, was remitted by plaintiff, and judgment was entered for $15,000, we do not deem that amount to be too much compensation for the loss of both legs by a healthy man of middle age.

9. APPEAL AND ERROR—PLEADING—WHERE AFTER GENERAL DEMURRER AMENDED PLEADING IS FILED TO WHICH NO DEMURRER IS INTERPOSED, NO INSUFFICIENCY WHICH MIGHT HAVE BEEN CURED BY AMENDMENT CAN BE URGED AS GROUND FOR REVERSAL.—Where defendant demurred generally to the complaint and thereafter an amended complaint was filed to which no demurrer was interposed, any insufficiency which might have been cured by amendment may not now be urged as ground for reversal.

10. PLEADING EVIDENCE—OBNOXIOUS TO SPECIAL DEMURRER.—Evidence must not be pleaded; only the general or ultimate facts need be

alleged. Pleading evidence bad, and obnoxious to special demurrer.

11. NEGLIGENCE—EVIDENCE—DRUNKENNESS OF ENGINEER—HABITUAL INTOXICATION—GENERAL REPUTATION AS TO RECKLESSNESS AND DRINKING INADMISSABLE.—Evidence that the engineer was drunk or under the influence of liquor, at the time, admissable as part of the *res gestae*. Evidence tending to show that the engineer was habitually intoxicated, and a reckless "runner," competent as tending to show that at the time alleged he handled his engine negligently. Evidence that this engineer was reputed to be a reckless runner, and in the habit of becoming intoxicated, inadmissable.

12. APPEAL AND ERROR—HARMLESS ERROR IN ADMISSION OF EVIDENCE.—Where the trial court erred in admission of evidence as to reputation which could only affect the question whether the engine was handled negligently, which question was clearly and overwhelmingly established by competent evidence, such error is harmless as it could not affect the verdict in the case.

Shields, C. J., dissenting.

Dismissed pursuant to the 28th rule. 127 U. S. 795; 32 Law Ed. 331.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Cochise. Affirmed.

The facts are stated in the opinion.

Haynes & Stiles, James Hagerman, and Sumner Howard, for Appellant.

Goodrich & Smith, for Respondent.

PORTER, J. Before entering into the merits of this case it is necessary to dispose of some preliminary questions. The defendant appeared specially, and moved to set aside the service of summons because not made upon the "president, or other head of the corporation, secretary, cashier, or managing agent thereof, or to any lawful agent appointed for that purpose, or any director or stockholder, as required by our statute." The return showed service upon J. H. Scott, agent

of defendant. The affidavit of E. B. Pomeroy, the duly-appointed, acting, and lawful agent, stated that said Scott was not the agent. The transcript does not show any order made on said motion. Therefore, for aught we know, the defendant may have abandoned his motion, and made a voluntary appearance. Comp. Laws, 414. The defendant filed a demurrer, setting forth "not waiving, nor intending to waive, its rights to be heard on the motion already noticed, and now pending, to vacate the summons," etc. It may have been waived on the overruling the demurrer. An answer was filed after demurrer was overruled, and no mention there made of special appearance. The party having answered, and having had his day in court, should not be allowed to reverse all the proceedings because of this irregularity of service. Our statute says: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the party, and no judgment shall be reversed or affected by reason of such error or defect." Comp. Laws, 2507. "It is a general rule, now prevailing in the courts, that whereever and whenever substantial justice is secured, a mere technical error, which is harmless in its character, and which has worked no injury, will not be permitted to defeat or annul the final conclusion or consummation of judicial proceedings." *Dyas* v. *Keaton*, 3 Mont. 501; *Sweeney* v. *Schultes*, 19 Nev. 53, 6 Pac. 45.

At the time of the institution of this suit (March 12, 1883), a statute had been passed (on the eighth of said month and year) requiring plaintiff, in every action sounding in tort, or for any interest in real estate, not evidenced by writing, at the time of the commencement of the same, to file a bond with the clerk to the effect that if he fails to prosecute to final judgment, or dismisses, that he will pay all damages defendant may suffer, together with reasonable counsel fees and costs. No specified amount was required. This improvident act was the last one of the legislature of 1883, and was repealed among the first of the succeeding legislature. We think it of very doubtful validity, as being special in its nature. The court permitted plaintiff to file a bond which accomplished all the purposes required by the act, and we see no error in it.

The motion for continuance on acount of the absence of witnesses was properly overruled, inasmuch as plaintiff admitted that the witnesses, if present, would testify to the facts stated in the afidavit. See Comp. Laws, c. 48, p. 433, § 160.

In November, 1881, the defendant was engaged in the construction of its railroad between Benson and Contention, in the county of Cochise. The plaintiff was employed by the defendant to drive a team, hauling and distributing ties from the end of the track. The ties were taken to the end of the track by an engine, and there unloaded and distributed by teams, one of which was driven by plaintiff to the places needed to extend the track. Plaintiff was employed by the month to drive this team of defendant, at $35 per month, and board. A large number of men were employed by defendant at the same time in the construction of the road, and all were boarded by defendant on boarding cars, which at that time were upon a side track or switch at Benson. Several miles of the track had been laid. At first, and for a number of days, the teams were driven back to dinner, but as the line was extended, by orders of defendant's supervisors, the plaintiff went back to dinner upon the empty train, upon which went all the workmen engaged in the construction of the road. The plaintiff had thus been going to dinner two or three times. While the men were at dinner the empty cars would be "side tracked," and other cars which had been loaded would be "made up" into a train to carry other material of different kinds to the end of the track, and on this loaded train the men were sent to their work. The dining cars were on a side track. Attached to the locomotive was a flat car, upon which were water-tanks, held on the car by two large wooden cleats nailed to the floor of the car, leaving a space at the end of the car of three or four feet. The loaded train was "backed" or "pushed" from the material yard to the end of the track, and, returning the cars would be at the head of the train.

The plaintiff and some others got on the water car before it became attached to the loaded cars standing on the track. The plaintiff and another man got upon that end which, when backed down, would strike the other cars. He says that after

dinner the whistle blew, which was the signal to return to the train; that the engine was moving when the signal was given, and it came down near the boarding train, and he hurried, and, with other men, got on; "and in a minute, without a moment's notice, the engine started, almost like a shot out of a gun, and ran into this train that was standing on the side track." He says he was sitting with his back against the round water-tank, about four feet from the end of the car, and a little to the right of the center of the tank. A violent collision occurred, the result of which was the moving the tanks and plaintiff, and both his feet and legs were crushed, and they had to be amputated.

There was conflict of testimony as to the position of plaintiff. A witness for defendant testified that his feet and legs were hanging down over the end of the car. The superintendent of the road testified that when the train was made up, and the engine attached, and they were ready to go, and the whistle was blown, then the men were to get on, and anywhere they could find a place. He had issued orders to that effect, and said the water car was not a safe place. The plaintiff testified that he never heard any such orders; that the orders were to get on the cars that were attached to the engine, when the whistle blew.

There was a conflict as to the engineer's condition as to sobriety at the happening of the accident. A witness (a saloon keeper) testified that immediately after "he was pretty full," and he also said: "Henry Moore [engineer] drank, and drank lots, too." The master mechanic, on the other hand, testified that immediately after the accident happened he jumped on the engine, and the engineer was sober.

The question first arises, did the undisputed facts warrant a submission of the case to the jury? In other words, whether the plaintiff, in getting upon the car, as stated by himself, was guilty of an act evidently dangerous, and in so doing was guilty of such negligence as should preclude him from having a verdict as a matter of law. In *Railroad Co.* v. *Stout*, 17 Wall. 657, the supreme court says: "It is true, in many cases, that, where the facts are undisputed, the effect of them is for the judgment of the court, and not for the decision of the

jury. This is true in that class of cases where the existence of such facts come in question, rather than where deduction or inferences are to be made from the facts. * * * In some cases, too, the necessary inference from the proof is so certain that it may be ruled upon as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled, as a matter of law, that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So, if a coachman intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or axle, which could not have been anticipated, an injury occurred, it might be ruled, as a question of law, that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. Upon the facts proven in such cases it is a matter of judgment and discretion—of sound inference—what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of the jury. Twelve men, of the average of the community, comprising men of education, and men of little education, and men of learning, and men whose learning consists only in what they have themselves seen and heard, —the merchant, the mechanic, the farmer, the laborer,—these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment, thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." 2 Redf. R. R. 231; *Patterson* v. *Wallace,* 1 McQueen, 748; *Mangam* v. *Brooklyn R. Co.,* 38 N. Y. 455; 98 Am. Dec. 66; *De-*

troit & M. R. Co. v. *Van Steinburg,* 17 Mich. 99. See other cases cited therein cited; also *Fernandez* v. *Railway Co.,* 52 Cal. 45; *Houston & G. N. R. Co.* v. *Randall,* 50 Tex. 261.

We hold that this case should have gone to the jury and that the motion for non-suit was properly denied.

Then, it not appearing from the evidence adduced by the plaintiff that this case should have been determined by the court on presentation of plaintiff's case, it was incumbent on defendant to prove a want of care. In *Railroad Co.* v. *Gladmon,* 15 Wall. 401, it is said: "If there are circumstances which convict him [plaintiff] of concurring negligence, the defendant must prove them, and thus defeat the action." In that case a quotation is made from *Oldfield* v. *New York & H. R. R. Co.,* 14 N. Y. 310, wherein DENIO, J., says: "I am of an opinion that it is not a rule of law of universal application that the plaintiff must prove affirmatively that his conduct on the occasion of the injury was cautious and prudent. * * * The culpability of the defendant must be proved affirmatively before the case can go to the jury; but the absence of any fault on the part of the plaintiff may be inferred from circumstances, and the disposition of men to take care of themselves, and keep out of difficulty, may properly be taken into consideration."

The jury in this case had fairly presented to them the fact as to whether the boarding of the car by plaintiff was done at the proper time, viz.: when the whistle blew for the men to get on, and whether the plaintiff used proper care and caution in getting on the tank car, and sitting where he did. Were the jury to presume upon the carelessness of the engineer, and was the plaintiff to so presume? Did not the jury determine that with ordinary caution in the engineer the plaintiff was in a position safe from harm? They had before them the proof that the water-tanks moved forward by the collision, and the water car was knocked off the track. They must have been satisfied that the conduct of the engineer was reckless, and that he acted regardless of the consequences. Had the engine-driver moved his engine with due care, plaintiff was safe, whether his legs hung over the end of the car or not, and he cannot be charged with negligence in presum-

ing that the engine-driver would use due care. They had before them the testimony that Hobson was a stranger to the engineer, and knew nothing about him. They had before them the contested point of the position of the legs of plaintiff, and the jury had this instruction given them; "If you find that an order was made by defendant in regard to the time and place of getting on the train to return to the end of the track, and the plaintiff violated the order by getting on the car before the train was made up, or before the signal was given to get upon the train, and that such violation contributed proximately to this injury received by plaintiff, he cannot recover;" and the trial judge had before him all the witnesses, could judge of their manner of giving evidence, etc., and he refused a new trial.

The next matter that presents itself for consideration is, did the plaintiff and the engineer occupy such relations towards each other that the act of the one exempted the common employer(the railroad company) from liability? The plaintiff's business was only to drive the teams from one end of the line for the distribution of ties still further on. Mr. J. C. Fitch was his immediate superintendent or foreman. Mr. Montandon was Fitch's immediate superior, and engineer of the track-laying department. The plaintiff had nothing whatever to do with the locomotive engineers, save to be taken to and from his dinner as ordered by Mr. Fitch. His work was not directly connected with this engineer. Had a fellow-teamster injured the plaintiff, then he could not recover from the employer, on the only just and true basis laid down in all the decisions, and more particularly the *Moranda Case,* 93 Ill. 302, 34 Am. Rep. 168, wherein this cogent language and argument is used: "Where servants of the same master are directly co-operating with each other in a particular business, at the time of the injury, or are, by their usual duties, brought into habitual consociation, it may well be supposed that they have the power of influencing each other to the exercise of constant caution in the master' work (by their example, advice, and encouragement, and by reporting delinquencies to the master) in as great and in most cases in a greater degree than the master. If, then, each such

cases therein cited; also *Fernandez* v. *Railway Co.*, 52 servant knows that neither he nor his fellow-servant, if injured by the other's negligence, can have redress against the master, he has such incentive to constant care that the well-being of society in such cases does not demand that the master be made to answer. The same considerations of policy which, to avoid injury to third persons, usually demand that the master be held responsible, seem plainly not to demand it in the case of such co-servants. But though servants are men employed by the same master, still, unless either their duties are such as that they usually bring about *personal associations* between such servants, or unless they are actually co-operating at the time of the injury in hand, or in the same line of employment, they have no power to incite each other to caution by counsel, exhortation, or example, or by reporting delinquencies to the master, and the well-being of society in such case must depend upon the devotion of the servant to the interests of the master, and the zeal of the master to promote a constant exercise of due care by his servants." And, further, says the opinion "Where servants of a common master are not consociated in the discharge of their duties; where their employment does not require co-operation, and does not bring them together, or in such relations that they can exercise an influence upon each other for the promotion of proper caution,—in such case the reason of the rule holding the master responsible for damages resulting from the negligence of one of his servants seems reasonably to apply with as great force as if a stranger were the party injured."

And even, in application to the case at bar, can be invoked the reasoning of Chief Justice SHAW in the celebrated case of *Farwell* v. *Boston & W. R. Corp.*, 4 Metc. 49, 38 Am. Dec. 339, wherein he says: "Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends to a great extent on the care and skill with which each other shall perform his appropriate duty, each is the observer of the conduct of the other, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such

precautions, and employ such agents, as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in the case of loss by the negligence of each other." *Farwell* v. *Boston & W. R. Corp.*, arose from injuries received by an engineer through the carelessness of another servant of the company, in the management of the switch, and the court, in announcing this doctrine of the exemption of the employer from liability, says that it is a nice question, and adds a "caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle."

The supreme court of the United States in *Randall* v. *Baltimore & O. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322, say that hitherto this court had not occasion to decide who were fellow-servants, and that for the purpose of that case it was not necessary to "undertake to lay down a precise and exhaustive definition of the general rule, or to weigh the conflicting views which have prevailed in the courts of the several states." There a switchman was injured by a train where there was "a net-work of tracks." There was no evidence that the tracks were improperly constructed, or that the engine-driver was unfit for his duty. The court there say that the general rule of law is established that one who enters in the service of another takes upon himself the ordinary risks of the negligence of his fellow-servant in the course of his employment. There the plaintiff was in attendance on his switches, and must have known all the dangers attendant thereupon, and could look out for the consequences. In the case at bar no such conditions arise. The engineer was taking plaintiff to his work, which was separate and distinct from that of the engineer. If the work of plaintiff was performed on or about the train, then, by the rules as laid down in the prevailing line of authorities, he would have been a fellow-servant with the engineer. We do not think the case at bar comes within this case; nor the case of *Hough* v. *Railway Co.*, 100 U. S. 213; nor in *Armour* v. *Hahn*, 111 U. S. 313; 4 Sup. Ct. Rep. 433; nor *Abend* v. *Terre Haute R. Co.*, 111 Ill. 202, 53 Am. Rep. 616. It does come within *Seaver* v. *Boston &*

M. R. R., 14 Gray, 466, and *Gilman* v. *Eastern R. Corp.*, 10 Allen, 233, 87 Am. Dec. 635, as the cases are stated in defendant's brief. We have had no access to these cases, but we do not agree with them as defendant states them.

Russell v. *Hudson River R. Co.*, 17 N. Y. 134, cited on this point by defendant, we have examined and find that the plaintiff was employed in loading gravel and sand at the pits where they were dug, upon cars, for transportation where filling was required. He and the others thus employed were paid monthly. The company took them to and from New York, (their home,) they paying no fare. On the occasion of the accident the plaintiff helped to unload, and his duties were then ended, and, on proceeding further, he was injured. And say the court: "It is not, I think, entirely clear that the defendants would not have had a right, under their agreement with the plaintiff, to insist upon returning to the city at night. The gravel train could not be properly managed by the engineer alone. It appears that some of the men who worked in the gravel-pit also manned the brakes. A portion of the hands employed lived in the city, and the defendant may have relied upon them to work the brakes in case of necessity, upon return of the train, and may have taken this as a consideration, in agreeing to bring them home at night."

There could not be any reasonable supposition that this plaintiff—a teamster, and nothing more—had, in the slightest degree, anything to do with the movement of this train hauling materials. In the above-cited case some of the workmen were used in and about the train in moving it. It is not analogous to this case, and we think, also, the court rather begged the question in that case. The eminent jurists deciding those cases put them, especially the *Farwell Case*, on the ground of public policy, saying that, "in considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned." The railways were then but few, and only for short distances. The employes could be known, one to the other, and to the common master,

and the dire consequences of the rule so established could not have been foreseen.

Judge Deady, in *Gilmore* v. *Northern Pac. R. Co.*, 18 Fed. 866, in commenting on those cases, in reference to the responsibility of the master by negligence of fellow-servants, uses this apt language: "In the progress of society, and the general substitution of ideal and invisible masters and employers for the actual and visible ones of former times, in the form of corporations engaged in varied, detached, and widespread operations, it has been seen and felt that the universal application of the rule often resulted in hardship and injustice. Accordingly the tendency of the more modern authorities appears to be in the direction of such modification and limitation of this rule as shall eventually devolve upon the employer, under these circumstances, a due and just share of the responsibility for the lives and limbs of the persons in its employ."

The harsh doctrine that an employe is presumed to take the risks incident to the undertaking, and that he is paid for the same, should never be invoked unless it applies to a case where each other's conduct can be observed; as where, for instance, one miner holds the drill while another strikes, or where in blasting or timbering, each is in a situation to know the want of care of the other. Any other application of such doctrine is, in our opinion, without disrespect to others, contrary to the dictates of common justice and common humanity. It is time that courts were coming back to the doctrine of "*respondent superior.*" It will best insure safety to life and limb by throwing the risk upon those who can best guard against the dangers, and who ought to use the utmost caution in the employment of their agents.

The supreme court of California in *Yeomans* v. *Contra Costa S. N. Co.*, say, (44 Cal. 71:) "Great objections have been made to the rule which relieves a master from liability for damages incurred by the negligence of a fellow-servant. While the rule is too firmly supported by authority to be overthrown, we are unwilling to extend it beyond the limits designated by the general line of decisions. Courts have gone so far as to relieve from responsibility corporations acting through

general agents, within the scope of their authority, classing the foreman, managers, and superintendents, with those under them, as co-laborers; but the supreme court of the United States begins to turn the tide, and Judge Field, in his learned and admirable opinion of *Chicago, M. & St. P. Ry. Co.* v. *Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, quotes approvingly from Redfield (volume 1, p. 554) these words: 'The consequences of mistake or misapprehension upon this point have led many courts into conclusions greatly at variance with the common instinct of reason and humanity, and have tended to interpose an unwarranted shield between the conduct of railway employes and the just responsibility of the company. We trust that the reasonableness and justice of this construction will, at no distant day, induce its universal adoption.''

To accord justice, the greatest difficulty is how to determine who are fellow-servants. If, as before said, they are those who could be watched by their fellows, then it would be unjust to hold the employers responsible. In the *Ross Case* it is said: "But notwithstanding the number and weight of such decisions there are in this country many adjudications of courts of great learning, restricting the exemption to cases where the fellow-servants are engaged in the same department, and act under the same immediate direction, and holding that, within the reason and principle of the doctrine, only such servants can be considered as are engaged in the same common employment. It is not, however, essential to the decision of the present controversy to lay down a rule which will determine in all cases what is to be deemed such an employment, even if it were possible to do so."

The *Ross Case* held the railroad company liable for injuries to the engineer caused by the negligence of the conductor of the same train in not showing the engineer an order from the train dispatcher of the coming of a gravel train, with which, by reason thereof, a collision occurred; and the court puts its decision upon the ground that the conductor had control of the train, and direction of the engineer, brakemen, etc., and, "as to them and the train, he stands in the place of and represents the corporation." Four of the members of the supreme court dissent from the opinion of the

majority of the court. Thus, it will be seen that in the minds of just and learned jurists no agreement exists. It is to be hoped that there will be uniformity of decisions on this question, so vital to the general welfare, and that the definition as to who are fellow-servants will be more definitely fixed.

The real issue in this case is, as given in the instructions of the court, as follows: "If the jury believe from the evidence in this case, and from all the circumstances in proof, that the plaintiff was employed by the defendant as a teamster for the purpose of drawing ties, and not employed as a hand on the train, and it was not any part of his duty to be connected with the train, then the court instructs you that the plaintiff would not be considered in law in the same line of employment as the engine-driver. If you believe, however, from the evidence, that the plaintiff was employed by the defendant for the purpose of driving a team, and was also employed, and it was a part of his duty, to be connected with, and he formed a part of the working force of and on the construction train, then the court instructs you that it would be considered in law that he was employed in the same line of employment as the engine-driver; and in that case you would find for the defendant on that point, unless you believe from the evidence that the engine-driver was incompetent, and that such incompetency was known to the defendant prior to his employment, or that such incompetency has been shown by the evidence to have ben known to the defendant by some agent or officer of the defendant, prior to the accident, who had a right to remove him, and, having the power to remove him, failed to remove him."

This was the gist of the case, and we take it that no other error would have worked an injury to defendant. *Chicago, etc. Ry. Co.* v. *Ross,* 112 U. S. 377; 5 Sup. Ct. Rep. 184; *Brobst,* v. *Brock,* 10 Wall. 519.

We do not understand whether or not it was determined by the district judge whether the affidavit of Dr. Handy and Mr. Pomeroy were used on motion for new trial. If so used, we hold they were not sufficient, because it does not appear that the testimony was discovered after the trial. *Arnold* v. *Skaggs,* 35 Cal. 687.

The only question which now remains is, were the damages excessive? The verdict and judgment were for $30,000. On the motion for a new trial the district judge was of opinion that it was excessive to the amount of $15,000. That sum, in open court, was remitted by plaintiff, and accordingly judgment was rendered for $15,000. We do not deem that amount to be too much compensation for the loss of both legs by a healthy man of middle age.

Before closing, one or two other points should be considered. It is urged that the complaint does not state a cause of action, and so no evidence was admissible under it, for the reason that negligence of defendant is not alleged with sufficient particularity. The complaint was filed March 12, 1883. A demurrer was filed April 3, 1883, making two grounds of demurrer: "That the first alleged cause of action does not state facts sufficient to constitute a cause of action; that the second alleged cause of action does not state facts sufficient to constitute a cause of action." This amounts to a general demurrer to the two statements of the cause of action or counts of the complaint. On December 11, 1883, an amended complaint was filed, the same as the first, except is added the allegation of due care on the part of plaintiff.

No demurrer seems to have been filed to the amended complaint; hence any insufficiency which might have then been cured by amendment may not now be urged as ground for reversal. The complaint, however, alleges (section 4) that the engine was out of order, and that, by reason thereof, and negligence and careless handling of the same by defendant and its servants, the car on which plaintiff was, was driven with great violence against a box car standing on defendant's track, by which plaintiff was injured. Section 3 states that plaintiff got on a train of cars of defendant to be carried, etc. For separate cause of action the complaint alleges that plaintiff was rightfully on a train of cars of defendant, and that, while on said train of cars, a collision occurred, caused by the negligence of defendant and its servants, whereby plaintiff was injured, etc. Were it admitted—which is not necessary for us to decide here—that this complaint would be obnoxious to a special demurrer on the ground that the alleged negli-

gence is not stated with sufficient particularity, we are of opinion that it is sufficient, as against a general demurrer. Evidence must not be pleaded; only the general or ultimate facts need be alleged. It would be proper to prove that a collision occurred by reason of a defective brake; that the brake was defective by reason of an unsound piece of wood; that the unsound piece of wood was used by a drunken workman; and that defendant did or by due diligence could have known him to be drunken, and retained him in that service. All these facts tend to prove that a collision occurred by reason of negligence, which is the alleged fact to be demonstrated. But it would be bad pleading, and obnoxious to a special demurrer on that ground. Bliss, Code Pl. § 211; Thomp. Neg. 1246 *et seq.;* and see *Wabash Ry. Co.* v. *McDaniels,* 107 U. S. 454; 2 Sup. Ct. Rep. 932; *Oldfield* v. *New York etc R. R. Co.,* 14 N. Y. 310; Boone, Code Pl. § 174, and cases cited.

It is also objected that the court permitted evidence to go to the jury tending to show that the engineer was drunk, or under the influence fo liquor, at the time, because that fact was not alleged. This evidence was part of the *res gestae.* It was one of the proximate facts existing at the time tending to prove that the engine was negligently driven against other cars. The engineer being drunk did not injure plaintiff; it was the collision, caused, perhaps, by intoxication. The court permitted evidence tending to show that the engineer was habitually intoxicated, and a reckless "runner." This was competent, as tending to show that at the time alleged he handled his engine negligently. It tended to prove the alleged fact of a collision caused by negligence. The court permitted evidence that this engineer was reputed to be a reckless runner, and in the habit of becoming intoxicated. While this was error, it is not such an eror as should reverse in this case. It could only affect the question whether the engine was handled negligently. Were that a doubtful question in this case, then this evidence should influence us to reverse the judgment. But the evidence is clear and overwhelming that the engine was driven under circumstances of great danger, with reckless violence against cars standing on the track. That being true, this evidence could not affect the verdict in this case.

The amended judgment rendered seventeenth November, permitting the judgment of twelfth of December, 1883, to stand, upon the plaintiff remitting $15,000, and the order denying the motion for a new trial, are affirmed.

Barnes, J., concurs.

SHIELDS, C. J., (*dissenting.*) I am unable to concur in the able opinion of my brother, Judge Porter, in this case, and will briefly state my reasons why. I think the opinion fails to consider at all important questions raised by the record, and discussed before us, upon argument, while the conclusion reached on some of the questions discussed I think are wrong. Several important questions were discussed on argument, and, among other objections, appellant insisted, in the first place, that, even though the plaintiff had otherwise shown himself entitled to recover, his own negligence so contributed to the injury as to preclude a recovery. In the second place, that the plaintiff was a fellow-servant with Moore, the engineer, through whose alleged negligence the injury occurred, and was therefore not entitled to recover. No negligence of the defendant being shown, all proof of the general reputation of Moore for unfitness, by reason of his general habits of intoxication, being improperly in the case, is without force to charge the defendant with negligence. And, third, that the court erred in its rulings and instructions. There were other questions discussed, but the main contention was over these propositions, as I have stated them. Upon these questions I now desire to state my views.

1. The proposition that, in an action of this kind, the plaintiff cannot recover, provided his own negligence contributed to the injury received, is too well founded in reason, and justified by authority, to admit of question,—hardly of discussion. Such must be regarded as settled law. The cases which announce such doctrine are too numerous to recite, but reference to a few are given here: *Lake Shore, etc., R. R. Co.* v *Miller*, 25 Mich. 274; *Marquette, etc., R. R. Co.* v. *Handford*, 39 Mich. 539; *Daniels* v. *Clegg*, 28 Mich. 32; *Minnick* v. *City of Troy*, 83 N. Y. 514.

In the 25 Mich. case the following language is used: "The

law is too well settled by the overwhelming weight of authority, both in England and the United States, to be now disputed, that, in an action like this—recovery for an injury arising from negligence of the defendants in carrying on their lawful business, without wanton or intentional wrong—the plaintiff cannot recover if his own negligence directly or approximately contributed to produce the injury, though the defendants may also have concurred in producing the result. This rule, it is true, often, perhaps generally, fails to produce justice, and, upon abstract principles of right and wrong, may be said to be frequently unjust in its operation. Justice might seem to require that each should bear the loss in the proportion they have respectively contributed to the injury. But precisely here lies the difficulty which is inherent in the nature of the subject, and the infirmity necessarily incident to all human administration of justice,—the impossibility of ascertaining which portion of the injury was produced by the negligence of the one, and what by the other, and in apportioning to each his just share of liability. * * * The absence of contributory negligence on the part of the plaintiff is therefore just as essential an element in the cause of action as the negligence of the defendants, and just as clearly constitutes a necessary part of the plaintiff's case; and until he has shown it, or until, in some way, it appears from the evidence, he does not make a *prima facie* case." See, also *Wilson* v. *Charlestown,* 8 *Allen,* 138, 85 Am. Dec. 693; *Galena C. U. R. Co.* v. *Fay,* 16 Ill. 585, 63 Am. Dec. 323; *Warner* v. *New York C. R. Co.,* 44 N. Y. 465.

There are certain exceptions to this rule, of course, and what they are is very fully and ably shown in the discussion of the case in 25 Mich., but a consideration of those exceptions in this case is not important. The rule being so well settled, any further discussion, I think, is unprofitable. But whether the plaintiff has been guilty of contributory negligence is usually a question of fact for the jury, and not one of law for the court. Of course, there may be cases where the negligence is so apparent, and the question so free from doubt, that it becomes the duty of the court to say that the plaintiff has been himself so negligent as to preclude a recovery. To warrant the court, however, in deciding that in any given case the

plaintiff was guilty of negligence, such case must be very clear, and one that reasonably and fairly would warrant no other inference than that of negligence. When, therefore, the question of negligence depends upon a disputed state of facts, or when the facts, though not disputed, are such that different minds might honestly draw different conclusions from them, the court cannot give positive instructions upon that subject, but must leave the jury to draw their own conclusions upon the fact, and upon the question of negligence dependent upon them. *Grand Rapids & I. R. Co.* v. *Judson,* 34 Mich. 506; *Sutton* v. *Wauwatosa,* 29 Wis. 21, 9 Am. Rep. 534.

On the trial of this case it appears the plaintiff contended that there was no evidence of contributory negligence on his part, while the defendant, with equal earnestness, insisted that the evidence of such fact was so clear that it was the duty of the court to have directed a verdict in its favor, and that, even if this were not so, there was still error in the instructions given on the subject, and in its submission to the jury. To determine which of these opposing positions is correct, we must examine into the testimony given on the trial, and the charge of the court. The case in behalf of the plaintiff mainly rested on his own testimony; at least, so far as the circumstances of the accident itself, this is true. From his testimony it appears that he was in the employ of the defendant, engaged as a workman in the construction of its road, or, rather, a branch thereof; that on the day he was injured he in common with two or three hundred other employes, were taken on board a train of box cars from the point where they were working back over the road, to Benson, a distance of four or five miles, for dinner; that, after obtaining the dinner, he jumped upon an engine and water car, upon which were two large water tanks, believing that was the train that was to take him back to his work, but, instead thereof, the train was carelessly, and at a high rate of speed, backing down the line of the road against some stationary cars standing thereon; and that, in the collision which took place, both his legs were broken in such a manner that amputation thereof became necessary; that he was called by the whistle of the locomotive to go upon such train, and did so,

believing it was the train to convey him back to his work; and claims, further, that, by reason of such whistle of the locomotive, he was properly upon the car in question; and that the accident took place by and through the carelessness of Moore, the engineer in charge of such locomotive.

There is testimony on behalf of defendant tending to show that this was a locomotive and car upon which the plaintiff had no business to be; that it was simply switching in the yard opposite the eating-house where plaintiff obtains his dinner, and that plaintiff sat in the rear of the car as it backed up against the stationary cars, with his feet hanging over; and that he was careless, not only in going upon the car in question, but also in the manner in which he sat upon the car. In this regard it is proper to state that the plaintiff's own testimony shows that the empty cars upon which he came to his dinner were on another track from the one he was on, and that he was aware of the fact when he went upon the water car upon which he was injured. From the evidence, I have no doubt the question of contributory negligence was one of fact for the jury. It is true, there are some things shown in the proofs of appellant which, if taken as true, no court should hesitate to declare the plaintiff guilty of such negligence as to prevent a recovery,—such, for instance, as that tending to show that the plaintiff went upon the car where he was hurt knowing the same was not the car for him to ride upon, and while such car was backing up and switching, before the time had come for him to go upon another car at all; and that he negligently rode, with his legs hanging down over the rear of the car, while it was being propelled backwards against the stationary cars. If such were the facts, of course, no court should hesitate in declaring the plaintiff guilty of such gross negligence as would anywhere prevent a recovery on his part. But this proof was denied by the plaintiff, and thereupon it became a question for the jury, who, and not the court, are to ascertain the truth from the conflicting testimony. *Conley* v. *McDonald,* 40 Mich. 150; *Railway Co.* v. *Slattery,* 39 Law T. (N. S.) 265; *Improvement Co.* v. *Munson,* 14 Wall. 448; *Pleasants* v. *Fant,* 22 Wall. 122; *Hickman* v. *Jones,* 9 Wall. 201.

This was a question of fact, depending upon the credibility of witnesses, or inferences from facts about which honest-minded men might fairly differ, and therefore it became a question of fact for the jury. But, while this was so, the appellant had a clear legal right to insist that the question should be fairly sumbitted to the jury under proper instructions. I do not think that was done. Appellant, on this branch of the case, asked the court to give the following request: "If you find that the plaintiff, in the exercise of ordinary care, might have avoided the injury, either by getting upon a different car, or occupying a different place upon the same car, and such want of ordinary care contributed approximately to the injury, he cannot recover." This was refused, and, I think, wrongly so. The request was proper in form, and pertinent and correct in law, and there was no similar instruction given in the general charge. The court in the instruction did use the following language: "If there be negligence on the part of the defendant, then whether it should be exempt from liability by reason of contributory negligence of the plaintiff is a question for your determination, under the evidence, as applied to the law of contributory negligence." That is the only reference to the question of contributory negligence throughout the entire charge. Evidently the judge, in giving this instruction, intended to refer again to the subject, but omitted to do so. This, it is easy to see, did not present the question as fully and fairly as it was appellant's right to have done. The jury should have been told, in substance, that if the plaintiff, by going upon that particular car, at the time and under the circumstances that he did, or by reason of the position taken by him thereon, or by any other act of his disclosed by the evidence and belief by the jury, was guilty of negligence contributing to the injury suffered, or if he omitted to exercise such due care as a reasonable, prudent, and careful person would have taken to avoid the accident, then he could not recover. The rules of law applicable to the subject should have been plainly stated. Nothing of the kind, however, appears in the instruction, and the jury are left entirely in the dark as to what it meant by "the law of contributory negligence," or

even as to what that expression, so used by the court meant. The request of the appellant should, therefore, have been given; and, under the circumstances, there being an entire absence of anything similar in the charge of the court, it was error to have refused it. The opinion of my Brother Porter omits entirely any reference to this feature of the question of contributory negligence, which was one of the vital questions in this case, and one that, it seems to me, should demand serious consideration at our hands. It is, indeed, stated in that opinion that the facts disclosed by the record are such that the court could not properly have decided the question of contributory negligence, and so far I agree with the opinion of Judge Porter. What I say is that the question was not fairly submitted to the jury, which is a wholly different question from the one whether or not the trial judge should have passed upon the question of contributory negligence.

2. I next consider the question arising out of the relations which the plaintiff bore to Moore, the engineer, through whose negligence he claims he was hurt, and the proof as to Moore's unfitness for the position he occupied. The plaintiff on the trial sought a recovery upon the two distinct theories: *First,* that the defendant was liable to the plaintiff for the negligence of Moore the same as it would be to a passenger or other person not in its employ, Moore not being a fellow-servant with the plaintiff; and, *second,* even if this were not so, and plaintiff and Moore were fellow-servants, still defendant was liable to the plaintiff on the ground that it was negligent in retaining Moore in its employment after he had become unfit by reason of habits of intoxication to discharge the duties of his place, and that these habits were so notorious the defendant should have known them.

In view of these theories upon the trial it is necessary to notice the case as made by the declaration. That is composed of two counts or causes of action. In the first the negligence is charged as follows: "That the engine or locomotive used by defendant in drawing its train was imperfect, and out of order, and in unsafe condition; that, by reason of such unsafe condition of said engine, and the negligent and careless handling of the same by the defendant and its servants, the car

upon which plaintiff was, was driven with great violence against the box car standing upon its said railroad track, by which plaintiff was thrown with great violence against said box car, and both his feet were caught between said box car and upon which said plaintiff was." The second count alleges the negligence as follows: "That while he [plaintiff] was upon said train of cars, as aforesaid, at the said town of Benson, in the county of Cochise, in said territory, a collision occurred on said railroad, caused by the negligence of said defendant and its servants, whereby the plaintiff was much injured, and had both his legs so bruised, crashed, and mangled that it was necessary, in order to save plaintiff's life, to amputate both of the said legs."

This is the declaration entire, so far as it undertakes to charge negligence. On the trial the plaintiff recovered upon the theories just stated, both of which were, by the court, submitted to the jury, who rendered a general verdict for the plaintiff. It is therefore uncertain which theory recovery was had upon. The court permitted the proof of the general habits of intoxication of Moore against the objection of appellant that the same was incompetent and inadmissible under the complaint. I feel entirely certain that this objection should have been sustained.

The complaint disclosed no such cause of action as proven in this regard, and did not apprise appellant that the same would be proved against it as a ground of recovery. This appellant was entitled to know. It is a rule of pleading that "every system of judicial altercation has for its object the accomplishment of two ends,—the first to apprise the parties, and the second apprise the court, of its precise subject of controversy; and these ends imply the necessity for precision in the use of words, in order to avoid equivocation,—to guard against the mischief and injustice of misleading statements. In construing the language of the declaration the course is to make reasonable intendments, and read and apply the terms in the natural and usual sense, and without supposing this or that qualification, which, though possible, is not fairly indicated." *Batterson* v. *Chicago, etc., Ry. Co.*, 49 Mich. 187, 13 N. W. 508.

In *Flint & P. M. Ry. Co.* v. *Stark*, 38 Mich. 717, it is said: "Negligence consists in the failure to observe that degree of care which the law requires for the protection of the interests liable to be injuriously affected by the want of it. In making out negligence, the first requisite is to show the existence of the duty which has been neglected. That duty is necessarily set out in the declaration, and the neglect averred, and the failure to prove it is a failure to make out the plaintiff's case." See, also, *Bluffton* v. *Mathews*, 92 Ind. 213; *Gilman* v. *Eastern R. Corp.*, 10 Allen, 233, 87 Am. Dec. 635.

In the case before us the direct cause of the injury was, of course, the alleged negligence of Moore in running the locomotive at too high a rate of speed, and the claimed negligence of the company upon which alone the proofs undertake to hold it responsible, aside from the theory that Moore and plaintiff were fellow-servants, was the omission on its part to make frequent or any examination into the qualifications or habits of Moore after having employed him, there being no claim that there was not due care in hiring him in the first instance. Now, under any system of pleading, code or otherwise, the facts upon which negligence is claimed must be stated. *Marquette H. & O. R. Co.* v. *Marcott*, 41 Mich. 433; 2 N. W. 795. In that case it is stated that "reason and good sense, as well as law, compel the plaintiff, by his declaration in these cases, to inform the defendant and the tribunal what the complaint is; and he must not only show that the defendant has been negligent, but must further show in what respect. The maters of negligence to which the injurious consequences referred must be properly stated." See, also, *Wright* v. *New York Cent. R. Co.*, 25 N. Y. 566; Boone, Code Pl. § 174; *City of Buffalo* v. *Holloway*, 7 N. Y. 493, 57 Am. Dec. 550; *Taylor* v. *Atlantic Nut Co.*, 2 Bosw. 106; *Gautret* v. *Egerton*, L. R. 2 C. P. 371.

There is no hardship to plaintiff in this or any other form of action in compelling him to adhere to the rule here stated, and which is supported by the clear weight of authority. He should know, when he commences his suit, the ground upon which he is to proceed. A contrary rule, however, or one which would sustain as correct the general allegations of

negligence, would be of incalculable hardship to a defendant, who might never know the negligence or omission to be relied upon till announced for the first time upon the trial. I do not mean by what I have said to intimate, even, that such proofs of general reputation for unfitness as were offered and received in this case, but against objection, may not be sufficient to authorize the recovery in a case where it is properly pleaded. I have no doubt that if an employer negligently employs an unfit person, generally known and reputed as such, or negligently continues such a person in his employment after such reputation has become known, the responsibility must rest upon such an employer, even though, in point of fact, he may have been ignorant of such unfitness, provided reasonable and proper care or examination and supervision would have made known such unfitness. The ignorance itself would be regarded as negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative. But in such case the plaintiff must allege the unfitness of the person employed,—the knowledge thereof by the defendant, or the existence of such facts as would amount to actual knowledge on the part of the defendant, and that would estop the defendant from a denial thereof. In such case, upon the trial, the burden is upon the plaintiff to prove that the defendant had such knowledge of such claimed unfitness, either actual or through such facts and circumstances as would estop the plaintiff from denying knowledge of the unfitness of such servant through whose negligence such injury happened. *Quincy Min. Co.* v. *Kitts*, 42 Mich. 34; N. W. 240.

The difficulty in this case is that one of the main theories and causes upon which the plaintiff recovered upon the trial, namely, the negligence of the defendant in retaining Moore in its employ after his unfitness by reason of his habits of intoxication, which were so notorious that the defendant should have known them, and would, had it exercised reasonable care in the management and supervision of its work and its employes, was not alleged in the complaint, and the proof of such cause of action was improperly received, against the

objection of the defendant. My brethren, while agreeing that this proof was improperly received, think it could not injure the defendant, and in this I cannot agree with them. It cannot be known from the charge of the court, and the verdict rendered, but that the recovery was had upon this proof; and, certainly, if that be so, it cannot be said the proof could do no injury. But even if it be true that the recovery was had upon the theory that the defendant was liable for the direct negligence of Moore, then the admission of this testimony, admitted to be incompetent, would be error. Its natural and inevitable effect was to prejudice the jury in passing upon any question of fact submitted to them,—to induce them to act from passion rather than from judgment.

3. This brings me to a consideration of the question whether Moore and the plaintiff were fellow-servants or not. Upon this subject I think that Moore and the plaintiff were unquestionably fellow-servants, and that being so, the law is well settled that the master is not liable to those in his employ for injuries directly and naturally charged to the negligence of fellow-servants, nor, under the authorities, does it make any difference that such fellow-servants are in different departments of employment, provided they are engaged in the same general business. *Davis* v. *Detroit & M. R. Co.*, 20 Mich. 105, 4 Am. Rep. 364; *Farwell* v. *Boston & W. R. Corp.*, 4 Metc. 49, 38 Am. Dec. 339; *Gilman* v. *Eastern R. Corp.*, 10 Allen, 233, 87 Am. Dec. 635; *Bold* v. *New York Cent. R. Co.*, 18 N. Y. 432; *Weger* v. *Pennsylvania R. Co.*, 55 Pa. St. 460; *Pittsburg, etc., Ry. Co.* v. *Devinney*, 17 Ohio St. 209; *Moseley* v. *Chamberlain*, 18 Wis. 700; *Randall* v. *Baltimore & O. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322.

In this latter case it is held that a brakeman, working a switch for his train on one track in a railroad yard, is a fellow-servant with an engine-man on another train of the same corporation, upon an adjacent track, and cannot maintain an action against the corporation for an injury caused by the negligence of the engine-man in driving his engine too fast, and in not giving due notice of its approach, without proving negligence of the corporation in employing an unfit engine-man. The pleader in that case followed the rule

which I have already stated, and which I think should prevail in all similar cases. The declaration there alleged that the servant through whose alleged negligence the injury took place was unskillful, negligent, and unfit to perform the business and employment he was engaged in by the plaintiff to perform, and that his unskillfullness and negligence and unfitness were known to the defendant. The doctrine as to liability for negligence of a fellow-servant in that case is stated as follows: "The general rule of law is now firmly established that one who enters the service of another takes upon himself the ordinary risks of his fellow-servants, in the course of the employment;" and while declining in that case to lay down the precise or the general definition as to who are fellow-servants, the court says: "Persons standing in such a relation to one another as did this plaintiff and the engine-man of the other train are fellow-servants, according to the very great preponderance of judicial authority in this country, as well as to the uniform course of decisions in the house of lords, and in the English and Irish courts, as is clearly shown by the cases cited. They are employed and paid by the same master. The duties of the two bring them to work at the same place, and at the same time; so that the negligence of the one in doing his work may injure the other in doing his work. Their separated services have an immediate common object,—the moving of trains. Neither works under the control or orders of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury caused by such negligence against the corporation,—their common master."

Under the rule here laid down, Moore and the plaintiff were unquestionably fellow-servants. They were employed and paid by the same master, and neither worked under the control or orders of the other; but both were under the control and orders of Fitch, the foreman of the work. Moore had no authority whatever over the plaintiff. Fitch directed when the train should start, where it should go, and directed the plaintiff and the other workmen when and where they should go upon the train to be conveyed to their dinner. Both Moore

and the plaintiff were therefore directly and absolutely under the control and orders of Fitch. They were therefore clearly, in my judgment, fellow-servants. It would serve no useful purpose to undertake to collect and review the many and conflicting authorities upon this subject, of who are, and who are not, fellow-servants. The true rule, sanctioned and sustained by the highest authority, as I understand it, is that the fellow-servant for whose negligence the company is not liable is one who labors in the same common employment, and who has not authority over the one injured, and who, no more than the injured party, is charged with the discretionary exercise of powers and duties resting upon and belonging to the company. The person causing the injury by his negligence must occupy some superior or commanding position to that of the person injured. *Chicago & N. W. Ry. Co.* v. *Bayfield,* 37 Mich. 205; *Moon* v. *Railroad Co.,* 8 Va. Law J. 540; *Nashville & D. R. Co.* v. *Jones,* 9 Heisk, 27; *Farwell* v. *Boston & W. R. Corp.,* 4 Metc. 49, 38 Am. Dec. 339; *Randoll* v. *Baltimore & O. R. Co.,* 109 U. S. 478, 3 Sup. Ct. Rep. 322

In *Bartonshill Coal Co.* v. *Reid,* 3 McQueen, 266, and *Bartomhill Coal Co.* v. *McGuire,* 3 McQueen, 300, the parties injured were miners, employed to work in a coal-pit, and the party whose negligence caused the injury was employed to attend the engine by which they were let down into the mine. The same engine, however, raised the coal from the bottom of the mine to the surface. In that case it was held that the engineer and the workmen were engaged in a common work, the court saying: "The miners could not perform their part unless they were lowered to their work, nor could the end of their common labor be attained unless the coal which they got was raised to the pit's mouth, and, of course, at the close of the day's labor, the workmen must be lifted out of the mine. Every person who engaged in such an employment must have been perfectly aware that all this was incident to it, and that the service was necessarily accompanied with the danger that the person entrusted with the machinery might be occasionally negligent, and fail in his duty."

I do not think that the case of *Chicago, etc., Ry. Co.* v. *Ross,* 112 U. S. 377, 5 Sup. Ct. Rep. 184, decided by the

supreme court of the United States, and relied upon by the plaintiff, establishes any other or different doctrine from that that I have stated. That case, like all the others, on examination, would be found to put the right of recovery upon the ground that the person through whose negligence the injury happened, was in a place of authority over the person injured, and occupied such a position as, for the time being, to stand in the place of and represent the company. Of course, in such a case as that, there can be no question about the liability of the company for the injuries so caused; but it is not true to say that Moore stood in any such position or attitude in the present case. In the *Ross Case,* just cited, Mr. Justice Field, in pronouncing the very able opinion in that case, says: "There is, in our judgment, a clear distinction to be made, in their relation to a common principle, between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakeman, the porters, and other subordinate employes. He is, in fact, and should be treated, as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. * * * We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements; and all persons employed on it are subject to his order. In no proper sense of the term is he a fellow-servant with the firemen, the brakemen, the porters, and the engineer. The latter are fellow-servants in the running of the train under his direction, who, as to them and the train, stands in the place of and represents the corporation." Now, I concur in all that, and give it my full sanction, but I cannot see how the case can

aid the plaintiff at all here. The reasoning there used and employed, as I look at it, is directly opposed to the position of plaintiff in this case. Upon the trial there was no pretense, and could be none, that the engineer, Moore, stood in the place of, or in any manner represented, the company. As I have already stated, he was simply, like the plaintiff, acting under the orders and control of the foreman of the work, who directed when and how the train should be moved. I think I have now said enough to indicate my views upon the features of the case stated, to show why I cannot concur in the opinion filed. Of course, the rule that I have stated here does not exempt the defendant from liability from negligence in employing an unfit servant, or negligently retaining such servant in its employment. Such a case, if properly alleged and proved, may justify a recovery, but under the declaration in the present case no such recovery could be had. As I have shown, the defendant was entitled to have such a case properly alleged. It is true, an amendment may remedy this hereafter; but that does not help the plaintiff now, as the case stands. The objection made to such proof affected the substantial rights of the defendant on this trial, and it is entitled to the benefits thereof. For the reasons stated I think the verdict and judgment should be reversed.

[Civil No. 167. Filed August 2, 1886.]

[S. C. 11 Pac. 397.]

ELIJAH CLIFFORD et al., Plaintiffs and Respondents, v. L. LARRIEU, Defendant and Appellant.

1. IRRIGATION—ACTION FOR WRONGFUL DIVERSION—PARTIES—WATER USER THOUGH NOT DITCH-OWNER MAY MAINTAIN ACTION FOR WRONGFUL DIVERSION—DITCH-OWNER NOT NECESSARY PARTY PLAINTIFF.—The owners of land irrigated by means of a ditch owned by another person, or a corporation, may have an action against one who wrongfully diverts water from the ditch.

2 SAME—DITCH-OWNER HAS RIGHT TO TOLL—WATER-USER TO WATER UPON PAYMENT OF TOLL.—Though the owners of the ditch be en-

titled to toll for the water, the owners of the land are entitled to the water on the payment of the toll.

APPEAL from a judgment of the County Court in and for the County of Cochise. Affirmed.

The facts are stated in the opinion.

William Herring, for Appellant.

The action should be dismissed because it appears that the plaintiffs are not the real parties in interest, who alone under our statutes are allowed to bring an action.

Goodrich & Smith, for Respondents.

The court below found that the action was brought in the name of the real party in interest. There being no evidence in the record that militates against such finding, this court will assume that the finding of the court below is in accordance with the evidence given at the trial.

BARNES, J.—The defendant seeks to reverse this case for the reason that the court erred in not dismissing the complaint, claiming that the evidence shows that the plaintiffs have no interest in the subject-matter. The statement does not contain all the evidence. It appears that plaintiffs sought to enjoin defendant from taking water from the San Pedro river above them, to the extent of impairing their use below for irrigation purposes; that plaintiffs use, and have for a long time used, water to irrigate some 600 acres of land. The water runs through a ditch, and defendant urges that the evidence shows that this ditch is owned by a corporation which is not a party plaintiff. It is not clear, from the record, that the corporation does own the water-right, or that plaintiffs have ever surrendered the right to use the water to the corporation. However, this may be, we cannot say, as a matter of law, that the owners of land irrigated by means of a ditch owned by an other person, or a corporation, may not have an action against one who wrongfully

diverts water from the ditch. Though the owners of the ditch be entitled to toll for the water, the owners of the land are entitled to the water on payment of the toll. The diversion of the water from the ditch would injure the owner of the ditch, it is true, but it would also injure the owner of the land to be irrigated, to deprive him of the water. The owner of the ditch, for many reasons, might decline to sue. He might be in collusion with the wrong-doer to destroy the value of plaintiffs' lands, in the hope of buying them. He might be actuated by private malice. He might, from motives of economy, refuse to embark in a lawsuit of this character. The rights of plaintiff would be of little value if they were subject to the interest, whim, or caprice of the owner of the ditch. We cannot, therefore, say, from the record, that the court erred in refusing to dismiss the complaint.

The judgment of the court below is affirmed.

Shields, J., and Porter, J., concur.

[Criminal No. 39. Filed September 4, 1886.]

[S. C. Pac. 671.]

THE TERRITORY OF ARIZONA, Plaintiff and Respondent, v. LOUIS BLOMBERG, Defendant and Appellant.

1. CONSTITUTIONAL LAW—LEGISLATIVE POWER OF TERRITORY LIMITED BY ORGANIC LAW—§ 1851, REV. S9. U. S. 1878, (ORGANIC LAW OF ARIZ. REV. ST. ARIZ. 1901, par. 15)—TERRITORIAL LAWS MUST BE CONSISTENT WITH CONSTITUTION—§ 1891 REV. ST. U. S. 1878 (ORGANIC LAW OF ARIZ. REV. ST. ARIZ. 1901, par. 67) TERRITORIES UNDER CONTROL OF CONGRESS—§ 3, ART. 4 CONST. U. S.—The limitation upon the legislative power of the territories is the organic law which governs them. A law of the territory which is not consistent with the constitution of the United States is beyond its powers, and invalid. The territories are under the complete control of Congress.

2. SAME—CRIMINAL LAW—PROCEDURE—ACT OF MARCH 12, 1885, PROVIDING FOR PROSECUTION BY INFORMATION INVALID INSOFAR AS IN

CONFLICT WITH THE FIFTH AMENDMENT OF CONSTITUTION—ACT NO. 83, LAWS OF 1885—PROSECUTION BY INDICTMENT FOR CAPITAL AND INFAMOUS CRIMES GUARANTEED BY CONSTITUTION—"INFAMOUS CRIME" DEFINED.—Act of March 12, 1885, providing for prosecution of crimes, misdemeanors and offenses by information, invalid in so far as in conflict with the fifth amendment to the constitution of the United States, which provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." Prosecution for infamous offenses by indictment by a grand jury is as firmly guaranteed by the constitution as the right of trial by jury. A crime punishable by imprisonment for a term of years at hard labor is an "infamous crime."

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Pinal. Reversed.

The facts are stated in the opinion.

Clark Churchill, Atty. Gen., and A. W. Blair, for the Territory.

G. H. Oury, for Appellant.

The Act of March 12, 1885, is invalid because it is in conflict with Article Five, Fourteenth Amendment of the Constitution of the United States, which provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." The Constitution of the United States provides, Article Sixth, Section Two, that "this Constitution and the laws of the United States, which shall be made in pursuance thereof shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. The Constitution gives Congress power to make all needful rules and regulations for the government of the territories. Article 4, Sec. 3, Subd. 2. Sec. 1891, page 334, Rev. St. U. S. provides that the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories and every

Territory hereafter organized as elsewhere in the United States.

The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. Sec. 1851, p. 329, Rev. St. U. S. 1878.

See, also, Story on the Constitution, Secs. 1784-86; 1 Kent Comm., p. 449; Cooley's Constitutional Limitations, p. 30; 1st Kent Comm., p. 313; Cooley's Constitutional Lim., p. 19, note 1; also, p. 78; Potter's Duarris on the Construction of Statutes, p. 185.

BARNES, J.—The defendant was, by information, charged with the crime of murder. He was tried in the county of Pinal, and found guilty of the crime of manslaughter, and sentenced for a term of seven and one-half years to the territorial prison. The legislative assembly of the territory, by a law which was approved March 12, 1885, provided for the prosecution of crimes, misdemeanors, and offenses by information. The validity of this law is the question presented here. "The legislative power of every territory shall extend to all rightful subjects of legislation (not inconsistent), with the constitution and laws of the United States." Section 1851, Rev. St. U. S. This limitation upon the legislative power of the territories is the organic law which must govern them. A law of the territory which is not consistent with the constitution of the United States is beyond its powers, and invalid. Again: "The constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within all the organized territories," etc., "as elsewhere in the United States." Section 1891, Rev. St. U. S. The territories are under the complete control of congress. "The congress shall have power to dispose of and *make all* needful rules and regulations respecting the territories." Section 3, art. 4, Const. U. S. The fifth amendment to the constitution of the United States, which provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury," must be held to reach as far as the congress

has power to legislate, and to embrace the whole jurisdiction of the acts of the congress. Clearly this includes the territories. In the case of *Scott* v. *Sandford*, 19 How. 449-451, it was declared by the court that the bill of rights of the federal constitution protects and defends a citizen of the territory. ("The federal government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any rights which it has reserved.") And if congress itself cannot do that, "if it is beyond the powers conferred on the federal government, it will be admitted, we presume, that it could not authorize a territorial government to exercise them. It could confer no power on any local government established by its authority to violate the provisions of the constitution." Prosecution for infamous offenses by indictment by a grand jury is as firmly guaranteed by the constitution as the right of trial by jury. Congress may not take away this right; *a fortiori*, the territories may not. A crime punishable by imprisonment for a term of years at hard labor is an "infamous crime." *Ex parte Wilson*, 114 U. S. 429; 5 Sup. Ct. Rep. 935. We therefore hold that the act referred to, providing for the prosecution of "capital or otherwise infamous offenses" by information, is invalid.

The judgment is reversed, and the cause is remanded.

Porter, J. concurs.

[Civil No. 169. Filed September 30, 1886.]

[S. C. 11 Pac. 753.]

W. J. TWEED, Petitioner, v. W. E. GUILD, Com'r., et al., Respondents.

1. FORCIBLE ENTRY AND DETAINER—STATUTORY PROCEEDING—§ 3, 4, 5, 6, c. 43, COMP. LAWS 1877, CITED—FILING COMPLAINT WITH CLERK OF COURT AND ISSUANCE OF WARRANT BY HIM NOT A COMPLIANCE WITH STATUTE—IN SUMMARY PROCEEDINGS STATUTE MUST BE STRICTLY FOLLOWED.—Where a complaint in forcible entry and detainer was filed under statute, *supra*, with the clerk of the district court, and a *capias* issued by him bear-

ing the teste of that court, such acts not being a compliance with the statute, the warrant issued and all proceedings thereunder are void. Summary proceedings of this character, to be valid, must strictly follow the law which creates them. Their jurisdiction is limited. No intendments are in their favor.

CERTIORARI to court commissioner in and for the County of Pinal. Reversed.

The facts are stated in the opinion.

Jeffords & Franklin, for Petitioner.

Grant H. Oury, for Respondent.

Barnes, J.—This is a *certiorari* to the court commissioner of Pinal, in which petitioner prays that proceedings in forcible entry and detainer, and the judgment therein, be declared null and void. It appears that on January 19, 1886, Josiah Champion filed with the clerk of the district court of Pinal a complaint alleging that Tweed and two others were guilty of forcible entry and detainer. The complaint was sworn to before the commissioner. Indorsed on the complaint was an order to the clerk to issue a *capias* for defendants. The clerk issued said writ under his hand and the seal of the district court. The sheriff served the writ by arresting Tweed, and taking him before the commissioner. Tweed filed an answer with the clerk of said court, claiming title and the right of possession in the premises. The judgment is as follows:

"This case coming on to be heard on the twentieth of February, 1886, the defendant, Wm. J. Tweed, having been in the custody of the sheriff under a warrant issued by Wm. E. Guild, a court commissioner for the Second judicial district of the territory of Arizona, in and for the county of Pinal, eluded and escaped from said custody, as shown by the statement of said sheriff of said Pinal county, failed to appear and answer to the complaint of said plaintiff; and the plaintiff, being in court by his said attorney, G. H. Oury, demanded that the trial of the cause be proceeded with notwithstanding

the absence of said Wm. J. Tweed, the defendant. Whereupon, after an examination of the testimony and papers in the case, it was adjudged by the said court commissioner that the said defendant, Wm. J. Tweed, was guilty of a forcible entry and detainer charged in plaintiff's complaint, and that said plaintiff have judgment against the said defendant for the restitution of said premises mentioned in the plaintiff's complaint, and one hundred dollars damages, together with the costs.

"Wherefore, by reason of the law and the premises, it is ordered and adjudged that the plaintiff, Josiah Champion, do have and recover of and from the defendant, Wm. J. Tweed, the restitution of the premises mentioned in plaintiff's complaint, viz., [here comes the description,] for one hundred dollars damages, together with the costs of this action taxed at the sum of four hundred and two and 60-100 dollars, as well as accruing costs.

"*Dated February* 24, 1886.

"WM. E. GUILD, Court Commissioner."

The forcible entry act under which these proceedings were had is as follows, (Complied Laws, *c.* 43:)

"Sec. 3. The person entitled to the possession of the premises, his agent or attorney, may make complaint in writing and on oath, and deliver the same to a district court commissioner, or to a judge of the district court, or judge of probate for the county, setting forth that the person complained of is in possession of the lands or tenements in question, describing them, and that he entered into the same with force, or that he unlawfully holds the same by force, as the case may be.

"Sec. 4. Upon receiving such complaint, the officer to whom the same is delivered shall issue his warrant, directed to the sheriff or any constable of the same county, commanding him to apprehend the person named in such complaint, and to bring him forthwith before such officer to answer such complaint.

"Sec. 5. The sheriff or any constable to whom any such warrant may be delivered shall execute the same by arresting the defendant, and bringing him forthwith before the officer

issuing such warrant, and shall thereupon notify the complainant of such arrest.

"Sec. 6. Upon the defendant being brought before such officer on such warrant, he may plead not guilty to the complaint, or, if he neglect or refuse to plead thereto, such officer shall enter such plea for him."

The filing of the complaint with the clerk of the district court, and the issuing of the *capias* by him bearing the teste of that court, was not a compliance with the above statute. The law requires the complaint to be delivered to a court commissioner, a judge of the district court, or a judge of probate, and such officer is authorized to issue "his warrant." Authority is given to no one else. The warrant issued in this case by the clerk was therefore void, and all proceedings under it were void. No default could be entered against defendant, nor could a plea of not guilty be entered for him in his absence. Summary proceedings of this character, to be valid, must strictly follow the law which creates them. Their jurisdiction is limited. No intendments are in their favor. *Galpin* v. *Page,* 18 Wall. 350-375; *People* v. *Reed,* 5 Denio, 554; *Buckley* v. *Lowry,* 2 Mich. 419; Sedg. Const. 301, 302.

This settles the main question raised in the case. The judgment is reversed, and complainant is ordered to make restitution of the premises.

PORTER, J., concurs.

[Civil No. 172. Filed September 30, 1886.]

[S. C. 11 Pac. 863.]

MECARIO ROMERO, Plaintiff and Respondent, v. W. A. DALTON, Defendant and Appellant.

CROPPING AGREEMENT—LANDLORD AND TENANT—PARTNERSHIP.—Where the agreement is that one, having no interest in the land owned by the other, shall farm it in consideration of his receiving a portion of the products, it is an ordinary cropper's contract, and

creates neither the relation of landlord and tenant nor that of partners between the parties.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Affirmed.

The facts are stated in the opinion.

C. C. Stephens, for Appellant.

The court below based its judgment on the ground that the contract between the parties was a "cropping contract" instead of a partnership agreement. An inspection of the contract will show that this is a radical error. These parties were tenants. A cropping contract is always made between landlord and tenant and never between tenants.

The justice's court having no equity jurisdiction (*e. g.*, partnership matters of dispute), and the District Court having, here, only the appellate law jurisdiction of the justice's court, defendant's motion for a nonsuit should have been granted.

Independent of the foregoing considerations, defendant's motion for a new trial ought to have been granted; within the spirit of the law he has not had his day in court.

R. D. Ferguson, for Respondent.

The agreement was simply a joint contract without involving the least of the essential elements of a partnership. "Where there is no community of interest in capital, stock, profit, or loss there is no partnership." *Smith* v. *Monihan,* 44 Cal. 53; *Wheeler* v. *Farmer,* 38 Cal. 203; *Robinson* v. *Haas,* 40 Cal. 474; *Barber* v. *Cazalis,* 30 Cal. 92.

The relation of landlord and tenant did not exist in this case,—Taylor Landlord and Tenant, fourth Ed. Sec. 14; Hilliard on Real Property, Vol. 1, Chap. XV, Sec. 24; Washburn on Real Property, page 572, Sec. 1; *Walker* v. *Pitt,* 24 Pick 19; *Putnam* v. *Wise,* 1 Hill, 234, 37 Am. Dec. 309 n; *Chamberlain* v. *Shaw,* 18 Pick. 278, 29 Am. Dec. 586; *Caswell* v. *Districh,* 15 Wend. 379; Story on Partnership, Sec. 91; Collyer on Part., Sec. 86; Watson on Part., Sec. 66.

BARNES, J. In this action the plaintiff, Romero, sues Dalton for the value of a share of a crop of wheat. The evidence shows that on the eleventh of August, 1885, Romero and Dalton made a contract in writing as follows: Dalton was to plow and sow in wheat two certain fields. Romero was to fence the exterior of said fields that may be without fence, and was to attend to the crop at his own expense, paying for water and keeping irrigating canals open; was to cut and harvest the crop, and was to furnish two men during the plowing season. The harvest was to be divided into two parts. The contract was complied with by both parties down to about the third day of May, 1885. Dalton, who was the overseer of the irrigating canals, refused to let Romero have any water for the crop. They wrangled about it, when Dalton and Romero agreed that Romero should have no more to do with it, and Dalton agreed to take all charge of the crop, and, when harvested, he promised to pay Romero $10 per ton for one-half of the crop.

The defendant moved for a nonsuit on the ground that the evidence showed that Romero and Dalton were partners, and hence could not sue for money due, but must seek an accounting; and, as this was an appeal from a justice of the peace, insisted that this court had no jurisdiction of the cause. This question is now presented for our consideration.

The contract has not the elements of a partnership. It was not a combining of property, labor, or skill for common profit, each sharing the hazards of the venture. 1 Pars. Cont. 147. It wass imply an agreement on the part of Romero to do certain work, and to be paid for it out of the crop. It was an ordinary cropper's contract, who is defined to be "one who, having no interest in the land, works it in consideration of receiving a portion of the crop for his labor." A contract to raise a crop on shares does not create the relation of landlord and tenant, even between the owner of the land and the one who dos the work. 1 Hil. Real Prop. *c.* 15, § 24; 1 Washb. Real Prop. § 10, p. 365; *Allwood* v. *Ruckman*, 21 Ill. 200. The cultivator of the soil may sell and assign his interest in the crop, and his assignee becomes tenant in common with the owner of the soil, as was the cultivator thereof.

Aiken v. *Smith,* 21 Vt. 182. It makes no difference what the title of the owner of the owner of the soil may be, whether in fee or leasehold. They are not joint tenants, as in a partnership, but tenants in common. *Currey* v. *Davis,* 1 Houst. 598; *Tanner* v. *Hills,* 44 Barb. 428,—are on all fours with this case. See *Walker* v. *Fitts,* 24 Pick, 191.

The judgment is affirmed.

[Civil No. 146. Filed October 1, 1886.]

JOHN M. MILLER, Plaintiff and Respondent, v. A. A. HOPKINS et al., Defendants, and H. A. TWEED, Garnishee and Appellant.

1. APPEAL AND ERROR—FAILURE OF EVIDENCE TO SUPPORT JUDGMENT.—Where the evidence fails to support the judgment the cause will be reversed.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Cochise. Reversed.

The facts are stated in the opinion.

W. H. Stilwell and Thos. Mitchell, for Appellants.

J. B. Southard and Webster Street, for Respondents.

Opinion by BARNES, A. J.

This is an appeal from the District Court of Cochise from a judgment against H. A. Tweed in proceedings supplemental to a judgment in favor of Miller against Hopkins and Packard, on the ground that Tweed was indebted to Packard and also had in his possession 269 head of cattle belonging to Packard. The evidence was taken before a referee and is to be found in the transcript in this case. On the coming in of the report Tweed moved to set aside the order of the referee. The motion was overruled on the ground that Tweed should have appealed to the Supreme Court from such order.

And thereupon appeals were perfected to this court both from the order of the referee and the judgment of the court. The question is purely one of fact and nothing is to be gained by a review of the same in this opinion. Suffice it to say that we do not think the evidence sustains the order and the judgment. The order of the referee and the judgment of the court are reversed.

Porter, J., concurs.

[Civil No. 171. Filed November 8, 1886.]

[S. C. sub. nom. *Johnson* v. *L. Zeckendorf*, et al., 12 Pac. 65.]

JOHN S. JOHNSON, Plaintiff and Respondent, v. P. R. TULLY, et al., Defendants and Appellants.

1. NEGOTIABLE INSTRUMENTS—PAYEE ENDORSING FOR DISCOUNT NOT CO-MAKER BUT ENDORSER.—Where the transaction is no other that the ordinary discount by the payee of the note by indorsement the payee, by writing his name on the back of the note, becomes not a co-maker but an endorser.

2. SAME—ENDORSERS ENTITLED TO NOTICE OF DEMAND AND NON-PAYMENT BY MAKERS UNLESS SAME IS WAIVED.—First endorsers are entitled to notice of demand and non-payment by makers unless this is waived.

3. SAME—PRINCIPAL AND AGENT—WAIVER OF PROTEST BY PERSON IN CHARGE OF BUSINESS OF INDORSERS AND WHO DEMEANS HIMSELF AS GENERAL AGENT IS SUFFICIENT TO BIND INDORSERS.—Where the bookkeeper of the indorsers was ostensibly in charge of their business during their absence from the city and demeans himself as general agent waiver of protest by him is binding upon his employers.

Petition for allowance of appeal to the Supreme Court of the United States denied. Post, 223.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Affirmed.

The facts are stated in the opinion.

Earll, Campbell and Stephens, and Charles Silent, for Appellant.

The case of *Rey* v. *Simpson,* cited by the respondent, has no application here. A careful perusal of the opinion of the court will show conclusively that it has no application whatever to a case where the payee of a note indorses it; but only to a case where a third party not the payee puts his name on the back of the note before it is delivered to the payee. *Goods* v. *Martin,* 95 U. S. 90, also cited by the respondent's counsel, is a case of similar character and deals with the same class of paper. The other case cited by respondent (*National Bank of Wooster* v. *Lockstitch Co.*, in the Circuit Court of Illinois) is a case of the same sort and rests upon the authority of *Goods* v. *Martin.* In none of these cases is a suggestion made that when the payee of a negotiable instrument indorses it before it is put in circulation he is to be treated as a joint maker, or as anything but an ordinary indorser, with all the rights belonging to that character, among which is a right to notice of non-payment by the maker. For a definition of "Indorser" see Daniels on Negotiable Instruments, Vol. 1, 3rd edition, Sec. 666. An accommodation indorser is just as much entitled to notice of non-payment as an indorser for value. 2 Daniels on Neg. Inst., Sec. 995, p. 53.

In *French* v. *Bank of Columbia,* 4 Cranch. 141, it was contended that notice to an accommodation indorser was unnecessary. In deciding that it was necessary, Chief Justice Marshall said: "Notice of non-payment by the maker is necessary because the undertaking of the indorser is conditional, and whenever in fact the transaction is such, that the maker of the note ought in justice to pay it, and is bound ultimately to make it good, it would seem reasonable that payment should be demanded of him, and that reasonable notice of non-payment should be given to the indorser."

That parol evidence cannot be received to alter, vary, or change the contract of indorsement we refer to *Bank of U. S.* v. *Dunn,* 6 Pet. 51, and 10 Curt. Dec. 20, which is conclusive upon this point, disapproving *Hill* v. *Ely,* 5 Serg. & R. 363, 9 Am. Dec. 376, in so far as it permits parol evidence to be introduced to contradict or vary the contract of indorsement. See, also, *Dale* v. *Gear,* 15 Conn. 15, 9 Am. Rep. 353; *Chaddock* v. *Van Ness,* 35 N. J. L. 517; *Fassen* v. *Hubbard,* 55

N. Y. 465; *Charles* v. *Denis,* 42 Wis. 56, 24 Am. Rep. 383; *Lee* v. *Pile,* 37 Ind. 107.

R. D. Ferguson, and Jeffords & Franklin, for Respondent.

In the light of all the circumstances and the understanding of the parties, L. Zeckendorf & Co. were joint makers of the note. *Rey* v. *Simpson,* 22 Howard, 341; *Goods* v. *Martin,* 95 U. S. 90; *Bank* v. *Lock Stitch Co.,* 24 Fed. Rep. 221. A joint maker is not entitled to notice of the failure of his co-maker to pay.

"In respect to the rights of the creditor the liability of the surety commences at the moment the contract of suretyship is executed. He is bound with his principal as an original promissor, and is a debtor from the beginning." Bayliss on Sureties and Guaranties, p. 133, Sec. 2.

"The holder is not obliged to give notice to the surety that the principal debtor has failed to pay, and that he is looked to on his suretyship." 1 Parsons on Notes and Bills, p. 236; Baylie's Sec. and Guar., p. 205, Sec. 7, and authorities there cited.

Compiled Laws of Arizona, Chap. XL; Sec. 5, p. 372, empowers Notaries Public to protest notes for non-payment. Sec. 6 provides that the certificate of the notary public under his hand and seal of office, of official acts done by him as such notary, shall be received as presumptive evidence of the facts contained in such certificate. But such certificate shall not be evidence of notice of non-acceptance or non-payment in any case in which a defendant shall annex to his plea of defense, an affidavit denying the fact of having received such notice.

Where protest of notes is provided for by statutory enactment, the protest when made is accorded the same effect as when made on a bill. And the waiver of protest of a note has the same significance as when waived in regard to a bill. Daniels on Negotiable Insts., Vol. II, p. 138-9.

Any words importing that protest is waived are, when applied to a foreign bill, universally regarded as expressly waiving presentment and notice, the protest being, according to the law merchant, the formal and necessary evidence of the dishonor of such instrument; Daniel, Vol. 2, p. 138, and cases cited; Parsons on Notes and Bills, Vol. 1, p. 579.

Since the statute of Arizona does provide for the protest

of inland notes, a waiver of protest also waives the demand and notice. Parsons, Vol. 1, p. 578, note.

As to what acts will establish authority upon the part of an agent to waive protest, see Daniels, Vol. 1, Sec. 296, and authorities cited; Vol. 1, p. 264, Sec. 278; *In Re Brown*, 2 Story, 502, Fed. Cas. No. 1985.

BARNES, J. This was an action brought by Johnson against L. Zeckendorf & Co., upon a promissory note made by Tully, Ochoa & Co., and purporting to be indorsed by L. Zeckendorf & Co. The note reads as follows:

"$2,800. TUCSON, A. T., September 17, 1881.

"Three months after date we promise to pay, to the order of L. Zeckendorf & Co., twenty-eight hundred dollars, at two per cent. interest per month, value received.

[Signed] "TULLY, OCHOA & Co.

Indorsed: "L. ZECKENDORF & Co.

After the indorsement of L. Zeckendorf & Co., and upon the back of the note, these words were written:

"We hereby waive protest.

"*Tucson, A. T., December* 17, 1881. L. ZECKENDORF & Co.

"J. WITTLESHOEFER."

It appears from the evidence in this case that the defendants, Tully, Ochoa & Co. and L. Zeckendorf & Co., were separate mercantile houses, doing business at Tucson; that the former were indebted to the latter, who were pressing for a reduction of the balance due. The plaintiff had made known to a broker by the name of Fried that he had $2,800 to loan. Zeckendorf & Co. went to the broker, and told him Tully, Ochoa & Co. were indebted to them, and that they were trying to get payment. Fried said he had a customer for whom he would loan $2,800, with Zeckendorf & Co.'s indorsement. Tully, Ochoa & Co. also asked him if he could get them a loan. He said he could with Zeckendorf & Co.'s indorsement. The note was handed to him, and plaintiff handed him the money, and he delivered the note to plaintiff. Zeckendorf & Co. paid him $42, one-half of 1 per cent. for 90 days' brokerage, for negotiating this loan. The money went to Zeckendorf & Co., and on that day Tully, Ochoa & Co. were credited $2,800 on the books of Zeckendorf & Co. The plaintiff left the note in the safe of Mr. Etchells for safe-

keeping. When the note was due, viz., December 17th, Etchells took the note to Zeckendorf & Co.'s place of business, and handed it to the person in charge of the main office. The person to whom it was handed directed him to Mr. Wittleshoefer, who was the book-keeper. The latter took the note, and wrote the indorsement of December 17th. At that time the members of the firm of Zeckendorf & Co. were absent, as well as Strauss, the general financial manager; and Wittleshoefer was left in charge of the business.

The court below found the above facts, substantially, and, as a matter of law, concluded that Zeckendorf & Co. was a joint maker of the note, and so liable, without notice of non-payment by Tully, Ochoa & Co. The court also found that Wittleshoefer was an agent authorized to waive protest, and bind the firm. The appellants seek to reverse this case for errors in concluding that Zeckendorf & Co. were joint makers, and not indorsers, and that Wittleshoefer was authorized to waive protest.

If Zeckendorf & Co. are joint makers, no notice and protest was necessary; but if they are indorsers, notice, demand, and protest were necessary and it then becomes important to inquire whether notice, demand, and protest were waived. Upon its face, this is no other than a contract of indorsement. Tully, Ochoa & Co. are the makers; Zeckendorf & Co. are the payees. Zeckendorf & Co. wrote their name on the back of the note, and so are indorsers in blank. This was done on the date of the note. The evidence in this case confirms that. Plaintiff was willing to loan on Zeckendorf & Co.'s indorsement, and not otherwise. Zeckendorf & Co. negotiated this loan,—that is, discounted the note,—and paid the brokerage therefor. The proceeds of the note went to them, and they, on the same day, gave Tully, Ochoa & Co. credit for the same. The transaction was no other than the ordinary discount by the payee of a note by indorsement. Tully, Ochoa & Co. owed Zeckendorf & Co., and gave their note to them, who indorsed it to plaintiff. It was not accommodation paper, nor an accommodation indorsement by a stranger to the note, and hence does not come within *Rey* v. *Simpson*, 22 How. 341; *Good* v. *Martin*, 95 U. S. 90, and that class of cases. These cases hold that a stranger to a note, who indorses the same before delivery, is a

joint maker of the note. While this is sustained by the weight of authority, and, as we think, by the better reason, it has met strong opposition. See note to *Burton* v. *Hansford,* (10 W. Va. 470, 27 Am. Rep. 580; note to *Jones* v. *Goodwin,* (39 Cal. 493,) 2 Am. Rep. 475; note to *Fitzhugh* v. *Love,* (6 Call, 5,) 3 Am. Dec. 571; and note to *Moies* v. *Bird,* (11 Mass. 436,) 6 Am. Dec. 182.

We conclude that the court below erred in holding that Zeckendorf & Co. were joint makers of the note with Tully, Ochoa & Co., and therefore liable as a principal.

As first indorsers, Zeckendorf & Co. were entitled to notice of demand upon and non-payment by the makers, Tully, Ochoa & Co., unless the evidence shows that this was waived. On the back of the note in evidence, on the date of the maturity of the note, was indorsed the words, "We hereby waive protest," signed by Zeckendorf & Co., "J. WITTLESHOEFER." It could not be contended that this would not be a waiver if signed by one of the firm of Zeckendorf & Co., but it is insisted that Wittleshoefer, who wrote "L. Zeckendorf & Co." on the note had no authority to do so. This was one of the issues of fact on the trial, and the court found that he had authority to waive protest, and bind the firm. We cannot say that this finding is erroneous. There is evidence to sustain it. The evidence was better presented before the trial court than it can be here, and that court can better determine disputed questions of fact. Etchells, with whom the note was left for safekeeping, testified that he told plaintiff when the note was due to remind him, and he would go and have them waive protest, or pay the money, that plaintiff did remind him, and on the day the note was due he took it to Tully, Ochoa & Co., first, and demanded payment, and they wrote their name on the back of it. He then took it to Zeckendorf & Co., and presented it to some one at the table in the front or main office, and he, whoever he was, directed him to Wittleshoefer, who was in the inner office. Wittleshoefer took the note and wrote the waiver of protest on the back, and handed it back to him. Nothing was said. He did not say he had no authority to do it. Wittleshoefer testified that he was the book-keeper of Zeckendorf & Co., and had been for five years; that the waiver of protest was in his handwriting; it was done in the office of Zeckendorf & Co.; Steinfeld and

Strauss were out of town; in their absence, that he had drawn checks; that his signature was placed in the bank by Mr. Steinfield; in the absence of Steinfield and Strauss, that he drew checks for the interest of the business, and it was left to his judgment as to amount, and when needed, and he would have checked to pay an accepted bill, when due and presented. Asked what he would have done if a matured note had been presented, and what would have been his authority, he did not answer. There was much evidence and much contradiction directed to proof of other similar acts by Wittleshoefer, but we do not think it material to inquire further. We think Zeckendorf & Co. were clearly bound by the waiver of protest by Wittleshoefer. Had he, in the absence of the members of the firm, and of Strauss, the general manager, been found in the general office of Zeckendorf & Co. on the day the note was due, and then and there he had been served with notice of demand upon the makers, and non-payment of the note, such service would have been good. *Bank of Louisiana* v. *Mansker*, 15 La. 115; *Banking Ass'n* v. *Place*, 4 Duer, 212; *Jacobs* v. *Turner*, 2 La. Ann. 964; *Merz* v. *Kaizer*, 20 La. Ann. 377.

We quote from Daniels on Negotiable Instruments, § 1017: "Notice left with a clerk or person in charge at the party's place of business, in his absence, or at his place of business, without proof as to the person with whom it is left, is sufficient; and proof that such person was not the party's agent has been held irrelevant, notice being left at the right place. So, leaving it with his private secretary, at his public office, is sufficient."

Notice served upon Wittleshoefer would have been good service, but when the service was made he waived protest, and all further steps in the matter. If he were not specially authorized to do this, who should lose,—his employer, or the person who found him ostensibly in charge of the business, in the absence of the employer, and towards whom he demeans himself as general agent in charge, and assumes to act as such? We think the former. This disposes of all the questions in the case.

The judgment is affirmed.

PORTER, J., concurs.

MEMORANDUM DECISIONS

JAMES REILLY, Admr., Respondent, v. T. F. HUDSON et al., Appellants. (Civil No. 155.)

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

G. G. Berry, for Appellants.

James Reilly, *in persona.*

March 16, 1886. Dismissed.

M. J. BELL, Respondent, v. PASQUAL NIGRO, Appellant. (Civil No. 166.)

APPEAL from the County Court in and for the County of Cochise.

William Herring and W. H. Savage, for Appellant.

George G. Berry, for Respondent.

March 16, 1886. Dismissed.

MYRTLE GODCHAUX, Respondent, v. JOHN DEMARBAIX, Appellant. (Civil No. 154.)

APPEAL from the District Court of the Second Judicial District in and for the County of Maricopa.

H. B. Lighthizer and John T. Alsap, for Appellant.

H. N. Alexander, for Respondent.

SHIELDS, C. J.—This case is similar in its facts with the case of *Asher* v. *Cox, ante,* 17, 11 Pac. Rep. 44, just decided, and is governed by the decision in that case. The writ of

assistance was improvidently issued, and must be set aside, and the order allowing it will be reversed.

Barnes and Porter, JJ., concurred.

(Opinion filed May 24, 1886.)

R. H. PAUL, Appellant, v. E. O. SHAW, Respondent. (Civil No. 173.)

Earll, Campbell and Stephens, and Haynes, Styles and H. R. Jeffords, for Appellant.

King and Dungan, for Respondent.

July 9, 1886. Dismissed on stipulation.

EX PARTE: IN THE MATTER OF IGNACIO GONZALES, Petitioner. (Civil No. 157.)

APPLICATION for writ of *habeas corpus*. Appeal from the District Court of the First Judicial District in and for the County of Cochise.

G. Gordan Adam, for Petitioner.

W. H. Savage, Dist. Atty., and Clark Churchill, Atty. Gen., for Respondent.

July 9, 1886. Writ dismissed and prisoner remanded.

S. R. DELONG, Appellant, v. CHARLES F. HINE et al., Respondents. (Civil No. 140.)

APPEAL from the District Court of the First Judicial District in and for the County of Pima.

Earll and Smith, and Campbell and Stephens, for Appellant.

Thomas Mitchell, for Respondents.

July 9, 1886. Affirmed.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

Territory of Arizona,

During the Year 1887.

[Civil No. 171. Filed January 10, 1887.]

[S. C. 12 Pac. 567.]

JOHN S. JOHNSON, Plaintiff and Respondent, v. P. R. TULLY et al., Defendants and Appellants.

1. APPEAL AND ERROR—APPEAL FROM SUPREME COURT OF TERRITORY TO UNITED STATES SUPREME COURT—JUDGMENT FIXES AMOUNT IN CONTROVERSY—ACT OF CONGRESS OF MARCH 3, 1885, CITED.—The act of congress of March 3, 1885, provides that "no appeal or writ of error shall hereafter be allowed from any judgment * * * in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars." Where the judgment is for less than that sum and in favor of the plaintiff and acquiesced in by him and the appeal was taken by the defendant against whom the judgment was rendered, and by the defendant the appeal is now prayed, the amount in controversy must be the amount of the judgment, and an appeal to the United States Supreme Court cannot be had.

FORMER OPINION. ANTE, 214.

PETITION for allowance of appeal to the Supreme Court of the United States. Denied.

The facts are stated in the opinion.

Earll, Campbell & Stephens, and Charles Silent, for Appellants.

Jeffords & Franklin, R. D. Ferguson, O. T. Rouse and Rush, Wells & Howard, for Respondent.

BARNES, J. This was an appeal from the district court of Pima county, from a judgment in favor of the plaintiff, Johnson, against the defendants L. Zeckendorf & Co. The amount of the judgment appealed from was $4,304.93, and was rendered in said court on the twenty-sixth day of September, 1885. On the eighth day of November, 1886, in this court, the said judgment was affirmed. Thereafter defendants filed their petition for a rehearing, which petition was on the eighth day of January, 1887, denied. The defendants thereupon prayed an appeal to the supreme court of the United States, and their application is accompanied with the affidavit of L. Steinfeldt, one of the defendants, who swears that the amount in dispute exceeds the sum of $5,000.

The act of Congress of March 3, 1885, provides that "no appeal or writ of error shall hereafter be allowed from any judgment..*..*..*..in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars."

The affidavit does not state that the matter in dispute, exclusive of costs, is over $5,000. The person who makes the affidavit has evidently based it upon the idea that the accrued interest since the rendition of the judgment in the district court, added to the judgment, makes a sum in excess of $5,000 and therefore his affidavit that the matter in dispute does exceed the sum of $5,000. The interest upon a judgment is an incident to the judgment, created by law, and it is not a part of the judgment itself. The judgment in favor of the plaintiff was acquiesced in by the plaintiff, and an appeal was taken by the defendant, against whom the judgment was rendered, and by the defendant the appeal is now proved. The

amount in controversy must be the amount of the judgment. The supreme court of the United States, in the cas of *Merrill* v. *Petty*, 16 Wall. 341, lays down the doctrine that the amount required is to be ascertained and determined by the sum in controversy at the time of the judgment in the circuit court, and not by any subsequent additions thereto, such as interest; and, further, that if the verdict is given against the defendant for a less sum, and judgment is rendered against him accordingly, nothing is in controversy between him and the plaintiff, if the plaintiff acquiesces in the judgment, beyond the sum for which the judgment is given. This case, and cases cited, together with the case of *Barney* v. *Martin*, 91 U. S. 365, seem to be decisive of this question. We are therefore compelled to hold that the amount in controversy in this case does not exceed the sum of $5,000, and therefore an appeal cannot be had to the United States supreme court from this court.

The appeal from this court is denied.

[Civil No. 156. Filed January 10, 1887.]

[S. C. 12 Pac. 607.]

C. H. GRAY, Plaintiff and Respondent, v. THE SALT RIVER VALLEY CANAL COMPANY, Defendant and Appellant.

1. IRRIGATION—FAILURE OF CANAL COMPANY TO DELIVER WATER—CONTRACT LIMITING LIABILITY—NOT BINDING UPON WATER USERS UNLESS ACCEPTED—WHERE MONEY IS ACCEPTED FOR WATER WITHOUT CONTRACT EVEN THOUGH WATER USER HAVE KNOWLEDGE OF ITS TERMS HE IS NOT BOUND THEREBY.—Where plaintiff sues an irrigating company for damages for failure to deliver water, the fact that the irrigating company required applicants for water to sign a certain form of contract, limiting its liability in certain cases, and providing for a pro rata distribution of water in times of scarcity, is no defense. Such contract is not binding upon plaintiff where it appears that the company received his money without its execution, even though the plaintiff had knowledge as a former director of the company of its terms.

2. IRRIGATION—MEASURE OF DAMAGES FOR FAILURE TO DELIVER WATER.—Considering the loss of the rent of land from the tenants, and what was a fair rental value of the land upon which a crop was prevented by reason of there being no water, the amount of the verdict held not excessive.

3. APPEAL AND ERROR—REFUSAL OF INSTRUCTIONS TO JURY—IN ABSENCE OF ASSIGNMENT OF ERROR THEREFOR THIS COURT WILL NOT REVIEW ANY ERROR THEREIN.—Where there is no assignment of errors in the refusal of instructions asked for by defendant this court will not review any error therein.

APPEAL from a judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Affirmed.

The facts are stated in the opinion.

Tweed & Hancock, for Appellant.

Defendant is not responsible for damages sustained by tenants of Gray. "The damages which a party can recover on breach of a contract are those which are incidental and caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract." Sedgwick on Measure of Damages, p. 67; Sutherland on Damages, p. 77; Powell on Ev., Chap. 2154, p. 216; *Hadley* v. *Baxendale,* 9 Wels. H. & G. 341; *Griffin* v. *Colver,* 16 N. Y. 494, 69 Am. Dec. 718; Mayne on Damages, 15; *Snell* v. *Callingham,* 72 Ill. 161; *Rockford* v. *Beckermeier,* 72 Ill. 267; *Richardson* v. *Northup,* 66 Barb. 85; *Dyer* v. *Haley,* 29 Maine, 277; *Woodruff* v. *Adams,* 5 Blackf. 317, 35 Am. Dec. 122; *Wiuve* v. *Kelley,* 34 Iowa, 340; *Ferrea* v. *Chabot,* 63 Cal. 564. "The *onus* is upon the plaintiff to prove the breach of any agreement and the amount of damages sustained by reason thereof, and only the damages thus proved are recoverable." *Quinn* v. *Van Pelt,* 56 N. Y. 419.

The breaking of the ditch, on account of the rain, the lowness of the river, etc., excused the defendant's performance and was a complete defense, because an Act of God. Broom's Legal Maxims, p. 393.

No officer had any authority to enter into any such contract as contended for in this case.

Cox & Campbell, for Respondent.

When the defendant received and accepted plaintiff's money for the amount of water applied for there then existed an implied contract upon its part to deliver to plaintiff the amount of water purchased.

The defendant corporation having received the benefits of this contract is estopped from denying its validity. Sedgwick on Statutory and Constitutional Law, p. 73; *Pixley* v. *W. P. R. R. Co.*, 33 Cal. 198, 91 Am. Dec. 623; *Foulke* v. *San Diego etc. R. R. Co.*, 51 Cal. 365; *Main* v. *Casserly et al.*, 67 Cal. 127, 7 Pac. 426.

The purchase price was paid to the proper officer and was endorsed upon the books of the company. The knowledge of the servant is the knowledge of the corporation. *Denver etc. R. R. Co.* v. *Conway*, 8 Colo. 1, 54 Am. Rep. 527, 5 Pac. 142.

The evidence as to the delivery of water is conflicting and this court will not review it. *Ehrlich* v. *Ewald*, 51 Cal. 172; *Thompson* v. *Thornton*, 47 Cal. 76; *Welkins* v. *McCue*, 46 Cal. 656.

Damages for loss of land and for loss of rent thereof, are allowable. *McKeon* v. *See*, 4 Rob. (N. Y.) 149; *Francis* v. *Schoellpopf*, 53 N. Y. 152; *Jutte* v. *Hughes*, 67 N. Y. 268; *Grand Rapids Booming Co.* v. *Jarvis*, 30 Mich. 308.

This court will not review the action of the court below in refusing instructions asked by appellant below, because said refusal is not specified as error in appellant's assignment of errors in its motion for a new trial. *Richardson* v. *Kier*, 37 Cal. 263.

PORTER, J. The plaintiff brings his action for damages for failure to deliver 100 inches of water purchased by him. Gray was a stockholder in the defendant company, and, under its rules, an application for water during the "water year" was required. He did so apply for 100 inches of water, and paid part of the purchase money, the treasurer telling him

it was not sufficient, and would not enter such payment on the books. Subsequently, on receiving the required sum, viz., $125, he did enter such payment on the books of the company. When the payment was made, Gray did not sign a note for the balance, which was one of the rules of the company, and on the fifth day of July, 1884, he paid all that was due, making the full sum of $250. There was a certain form of contract to be signed, restricting the liability of the company in many particulars, and in this, that there should be a *pro rata* division in case of insufficiency of water to supply all the customers where such insufficiency occurred by reason of such a rise in the river as would break the dam or ditch, or by some unavoidable accident, and fixing the damages of non-delivery of water at a fixed sum. These contracts were to be executed by the president of the company, and delivered to purchasers of water. No such contract was delivered to plaintiff. He paid the full amount due for the water on the fifth of July, 1884, to the treasurer, and it was entered upon the books of the company; and at such payment plaintiff refused to receive the usual contract.

It is contended that Gray, having been a director of the company, knew of the provisions of these contracts, and should be bound by them. We can see no good reason why he should be, when thec ompany received his money without the *onus* of such a contract. The company ignored its own by-laws, and, having received the money, cannot now go behind its action. The case of *Pixley* v. *Western P. R. Co.*, 33 Cal. 183, 91 Am. Dec. 623, cited by respondents, well applies to this case. There the company had a certain by-law, by which no contract was to be binding on them unless made in writing. Pixley was attorney for the company, and performed his duties with knowledge of the company, and without such written contract. The court say: "It may be that, while such contract remains executory on both sides, an action could not be maintained by either party to enforce it; but, where one of the contracting parties has completely performed it on his part, and thereby rendered to the other the consideration stipulated, the party having received the consideration promised cannot be permitted to escape liability on the naked

letter of the statute, because the motive of the law is not such as to afford immunity from liability in such a case."

So, in this case, the company received the money for the water through its proper officer. The knowledge of the servant is the knowledge of the company. *Denver, etc. R. Co.* v. *Conway,* 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. 142.

As to the sufficiency of water furnished, there was such a conflict of evidence, that this court will not review it. *Ehrlich* v. *Ewald,* 51 Cal. 172 *et seq.*

It is somewhat difficult to arrive at the damages; but when we consider the loss of the rent of land from the tenants, and what was a fair rental value of the land upon which a crop was prevented by reason of there being no water, we do not deem the amount of the verdict excessive.

There was no assignment of errors in the refusal of instructions asked for by defendant, hence this court will not review any error therein. *Richardson* v. *Kier,* 37 Cal. 263.

Judgment affirmed.

[Civil No. 174. Filed January 17, 1887.]

[S. C. 12 Pac. 614.]

MAX ORDENSTEIN, doing business as Ordenstein & Co., Plaintiff and Appellant, v. JAMES BONES and CHARLES SPENCER, co-partners as Bones & Spencer, Defendants and Respondents.

1. ATTACHMENT—COMP. LAWS 1877, p. 426, par. 2557, CITED—EVIDENCE—ACCOUNT STATED ADMISSION OF INDEBTEDNESS RENDERING UNNECESSARY OTHER PROOF—STATING OF ACCOUNT WITHIN THIS TERRITORY FOR GOODS SOLD WITHOUT IS NOT A NEW CONTRACT TO SUSTAIN ATTACHMENT UNDER STATUTE SUPRA—ATTACHMENT SUMMARY REMEDY AND PLAINTIFF MUST COME CLEARLY WITHIN ITS PROVISIONS.—Where goods were sold by plaintiff without the territory and thereafter the open account therefor was stated within the territory by the written admission of defendant of the correctness of the account such account stated amounts to a solemn admission of the fact of indebtedness, which, if proved, makes unnecessary other evidence of the indebtedness, rather than a new

contract. It is not a contract made in this territory, for goods sold out of the territory, to sustain an attachment under the statute *supra*, authorizing the issuance of a writ there plaintiff sues to recover "an indebtedness upon a contract, expressed or implied, for the direct payment of money, and that such contract was made or is payable in this territory." Attachment is a summary remedy, and a plaintiff must clearly come within its provisions to invoke its powers.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. Affirmed.

The facts are stated in the opinion.

Herndon & Hawkins and E. M. Sanford, for Appellant.

The stating of an account changes the nature of the original indebtedness and becomes a new contract or undertaking. *Mayre* v. *Strouse*, 6 Sawy. 204-17, 5 Fed. 483; *Foster* v. *Allanson*, 2 Term R. 479; *Carey* v. *P & C. Petroleum Co.*, 33 Cal. 694; *Holmes* v. *DeCamp*, 1 Johns. 34, 3 Am. Dec. 293; *Montgomery* v. *Ivers*, 17 Johns. 38; *White* v. *Campbell*, 25 Mich. 463.

The consideration for the new contract is the agreement and acts of the parties in striking a balance concerning their previous dealings. *Chace* v. *Trafford*, 116 Mass. 532, 17 Am. Rep. 171; *Melchoir* v. *McCarty*, 31 Wis. 252, 11 Am. Rep. 605.

The account having been presented in Arizona and the endorsement thereon made and signed there, thus creating a new contract, such new contract is governed by the laws of the place where it was signed and becomes therefore subject to all the remedies of the *lex loci contractus*.. 2 Parsons Contracts (6th Ed.) §§ 583-586.

Rush, Wells and Howard, for Respondents.

Proceedings by attachment under our statute is an extraordinary remedy, not known to the common law, and a party to avail himself of this remedy must bring himself clearly within the statute.

The stating of an account is but an agreement that the balance stated is due upon the original contract, and its only effect is to change the character of the proofs at the trial, viz: Instead of proving the items of the original account and their value and contract price, it is sufficient to prove the original indebtedness, and defendants' admission and agreement that the balance stated is the amount due. *Chace* v. *Trafford,* 116 Mass. 532, 17 Am. Rep. 171; *White* v. *Campbell,* 25 Mich. 462, note.

When a contract for the payment of money is made out of the territory it can only be made payable within the territory so as to bring it with the terms of the statute (attachment) by special contract. *Dulton* v. *Shelton,* 3 Cal. 206; *Eck* v. *Hoffman,* 55 Cal. 501; *Trabant* v. *Rummell,* 14 Or. 17, 12 Pac. 56.

BARNES, J. The statute (Comp. Laws, 2257) authorizes the issuing of an attachment writ where plaintiff sues to recover "an indebtedness upon a contract, expressed or implied, for the direct payment of money, and that such contract was made or is payable in this territory." Plaintiff in this case was a merchant doing business in California, and sold goods to defendants, who were living in this territory. It is admitted that such sale of goods was made in California, and that such contract would not support an attachment writ. After the sale was made, however, defendants, when, pressed for payment, and being unable to pay then, were asked to acknowledge the debt, and did so in the following words, in writing:

"PRESCOTT, November 16, 1885.

"The above balance, fourteen hundred and ninety-three 96-100 dollars, due Ordenstein & Co., is correct.

BONES & SPENSER."

This was written on accout for goods sold, at the place of business of defendants, in Prescott, Arizona. This writing is made the basis of this suit, and an attachment writ was issued on the ground that this latter writing is a contract made in this territory, and payable here.

We have been referred to many cases tending to show that

an account stated was a new contract at common law, and that the above writing creates an account stated. At common law, when an amount due on an open account was agreed upon, then the law implied a promise to pay that particular amount. So, when goods were sold and delivered, the law implies a contract to pay the price for them. It is insisted that being an account stated, it became an implied contract to pay, and, made in this territory, brings the action within the attachment laws. While much has been said and written by way of argument which sustains this view, yet a careful analysis of an account stated at common law leads to the conclusion that it amounts to a solemn admission of the fact of indebtedness, which, if proved, makes unnecessary other evidence of the indebtedness, rather than that it is a new contract.

It is said in *Chace* v. *Trafford,* 116 Mass. 532, 17 Am. Rep. 171: "An account stated is an acknowledgement of the existing condition of liability between the parties. From it the law implies a promise to pay whatever balance is thus acknowledged to be due. It thereby becomes a new and unpaid cause of action, so far as that a recovery may be had upon it without setting forth or proving the separate items of liability from which the balance results." This case, therefore, treats it rather as an admission of a fact than as a contract, and the case decides that the statute of limitations begins to run from the date of the last item of the account. The account stated is not a new promise, to bring an account within the statute of limitations. To the same effect is *White* v. *Campbell,* 25 Mich. 463.

If an account stated is not a new promise, to bring an open account within the statute of limitations, *a fortiori,* it is not a contract made in this territory, for goods sold out of the territory, to sustain an attachment. This is summary remedy, and a plaintiff must clearly come within its provisions to invoke its powers. *Eck* v. *Hoffman,* 55 Cal. 502; *Dulton* v. *Shelton,* 3 Cal. 206. By the paper sued on in this case the defendants simply say: "The above balance due is correct." This is a solemn admission of indebtedness, which could only be questioned for mistake or

fraud; but it is simply an admission by defendants that they owe plaintiff a certain amount for the goods sold as stated in the account. The parties intended no more than that. *Gooding* v. *Hingston,* 20 Mich. 441. There is a broad distinction between an "admission" and a "contract." Nothing short of a contract made or payable in this territory gives the right to a writ of attachment. We do not think this paper is more than an admission of indebtedness. It does not change the nature of the old contract, or make a new one in this territory, but it dispenses with proof of the account.

The judgment of the district court dissolving the attachment is affirmed.

PORTER, J., concurs.

[Civil No. 175. Filed January 17, 1887.]

[S. C. 12 Pac. 686.]

J. T. SIMMS, Plaintiff and Respondent, v. J. H. HAMPSON et al., Defendants and Appellants.

1. CONTRACTS—SUBLETTING OF RAILROAD CONTRACT—INCORPORATION OF ORIGINAL CONTRACT INTO SECOND CONTRACT EXCEPT AS TO CONFLICTS—INTERPRETATION.—Defendants had contracted with one Underwood for the construction of a railroad, and had sublet certain construction work to plaintiff agreeing to pay him for the work done in any one calendar month on or before the fifteenth or twentieth of the following month. Plaintiff agreed to be bound by the provisions of the contract of defendants with Underwood, and that all estimates done or claimed by him should be made by engineers in accordance with the original contract, which was incorporated, except as to conflicts. Under the contract the plaintiff is not obligated to secure certificate from Underwood's engineers, he not being in privity of contract with Underwood. It was for the defendants to obtain such estimates and on the twentieth of each month there was due plaintiff the amount for the work done during the preceding month and he then had a right of action therefor

INTEREST—COMP. LAWS ARIZ. 1887, p. 574, par. 3450, CONSTRUED—CONTRACT FOR CONSTRUCTION OF RAILROAD "INSTRUMENT IN WRITING" AND BEARS INTEREST UNDER STATUTE.—Contract between plaintiff

and defendants for construction of railroad is an instrument in writing within meaning of statute, *supra*, and bears interest.

ACCORD AND SATISFACTION.—Where defendants deposited a sum in the bank to be placed to plaintiff's credit when he had given a receipt in full, and the bank passes it to the plaintiff's credit and explains the circumstances and demands from him a receipt in full which he refuses to give, the mere fact of plaintiff withdrawing the money under the circumstances does not constitute a release.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. Affirmed.

The facts are stated in the opinion.

E. M. Sanford, and Neill B. Field, for Appellants.

This action is substantially one for interest on deferred payments after the plaintiff had accepted payment at the contract price, or what was believed by both parties to be the contract price of the work and labor done and performed by the plaintiff.

"Where there is a stipulation for interest, it may be recovered even after the principal debt has been paid, but it is otherwise where the interest is recoverable merely as damage, or as incident to the debt." Chitty on Contracts, 7 Am. Ed., page 647, note 2, citing *Fake* v. *Eddy*, 15 Wend. 76; *Gillespie* v. *Mayor of N. Y.*, 3 Edw. 512; *Stone* v. *Bennett*, 8 Mo. 41.

In the absence of a stipulation to pay interest, the law does not make a party liable for interest until he is in default for not paying the principal. *Gay* v. *Gardner*, 54 Maine, 477.

Where interest is recoverable only as damages, for the non-payment of money when due, the receipt of the principal by the creditor is a bar to any claim for interest. *Zacot* v. *Emmett*, 11 Paige, 142; *Tenth Nat. Bank* v. *Mayor etc.*, 4 Hun. 429; *Am. Bible Society* v. *Wells*, 68 Maine, 572, 28 Am. Rep. 82; *Hayes* v. *Chicago etc. R. R. Co.*, 64 Iowa, 573, 19 N. W. 245; *Howe* v. *Bradley*, 19 Maine, 31; *Succession of Anderson*, 12 La. Ann. 95, *Comparet* v. *Ewing*, 8 Blackf. (Ind.) 328; *Potomac* v. *Union Bank*, 3 Cranch. C. C. 101, Fed Cas. 11,318;

Robins etc. Co. v. *Brewer,* 46 Maine, 481; *Johnson* v. *Braman,* 5 Johns. 268.

This is an action for an unliquidated demand for work and labor, where interest is never allowable except upon an agreement to pay it, expressed or implied. *Reed* v. *Rens. Glass Factory,* 3 Cow. 393; *Crosby* v. *Otis,* 32 Maine, 256; *Loitard* v. *Graves,* 3 Caines (N. Y.), 225; *Miller* v. *Griswold,* 6 Johns. (N. Y.) 45; *Kane* v. *Smith,* 12 Johns. 156; *Walden* v. *Sherburn,* 15 Johns. 425; *Van Buren* v. *Van Grosbeck,* 4 Cow. 496; *Tucker* v. *Ives,* 6 Cow. 193; *Doyle* v. *St. John's Church,* 7 Wend. 178; *Tillotson* v. *Preston,* 3 Johns. 229; *Moore* v. *Fuller,* 2 Johns. 205; *Robins Co.* v. *Brewer,* 48 Maine, 481; *Southgate* v. *A. & P. R. R. Co.,* 61 Mo. 89.

Interest is not allowable on this claim because of the provisions of Compiled Laws, 1877, page 574, sec. 3450. This is not an action for money due on any bond, bill or promissory note, nor is it for money due on any other instrument of writing within the meaning of this section. It is a familiar rule of construction that where general words follow particular words, the former are construed as applicable to the things or persons particularly mentioned. Under this rule, the words of this section "other instruments of writing" must be held to mean other instruments of writing *ejusdem generis* with bonds, bills and promissory notes. Sedgwick on Constitutional Law, page 360, and notes. The remainder of the section is a statutory limitation on the power of the courts of this territory to allow interest. Under this section they may allow interest from the day on which the balance is ascertained. *Expressio unius est exclusio alterius.* There was no ascertained balance at any time before the institution of this suit and therefore the appellee could not recover interest.

Rush & Wells, for Respondents.

A permission of the performance of a contract is a waiver of the condition precedent. *Loup* v. *California etc. R. R. Co.,* 63 Cal. 102; *Blethen* v. *Blake,* 44 Cal. 120; *Downey* v. *O'Donnell,* 92 Ill. 563.

Every material allegation of the complaint, not specifically

controverted by the answer, shall, for the purposes of the action, be taken as true. Secs. 2482 and 2501, Compiled Laws of Arizona.

When interest is not specified in a contract, but is annexed as an incident by statute, it is allowed as damages for the refusal or failure to pay the debt. *Dunne* v. *Mastick,* 50 Cal. 247; *White* v. *Lyon,* 42 Cal. 284; *Howe Ins. Co. of Texas* v. *Myers,* 93 Ill. 277.

It is a familiar rule of the law of damages (in the absence of express statute providing a different rule) that upon a breach of a contract for the payment of money, the measure of damages shall be the legal interest on the sum due to the plaintiff from the date of the breach. *McLane* v. *Abrams,* 2 Nev. 204; *Kohler* v. *Smith,* 2 Cal. 597, 56 Am. Dec. 369; *Williams* v. *Sherman,* 7 Wend. 109; *Dodge* v. *Perkins,* 9 Pick. 384; *Van Rennsselaer* v. *Jewett,* 2 N. Y. 135, 51 Am. Dec. 278, notes; *Selleck* v. *French,* 1 Conn. 32, 6 Am. Dec. 185. Interest shall be allowed upon all moneys after they become due on any bond, bill, promissory note, or other instrument of writing. Sec. 3450, Compiled Laws.

BARNES, J. This is a suit by Simms, plaintiff, against defendants, Hampson and Garland, for a balance he claims to be due for work, labor, and material furnished on a contract. Defendants had contracted with one Underwood for the construction of a railroad from Lordsburg to Clifton, according to the ordinary terms of a railway contract, and they sublet the construction of three tunnels, on the line, to plaintiff, agreeing to pay him 5 per cent. less than their contract price for the work with Underwood. Simms undertook to excavate said tunnels, of the "size, character, and length required by the engineer of the railway company under the original contract," and defendants undertook "to pay for the work done in any one calendar month, on or before the fifteenth or twentieth of each calendar month following, less 10 per cent. thereof; which shall be retained until the completion of the work," subject to all instructions by the engineers of the railway company; and he agreed to be bound by the provisions of the contract of defendants with Underwood, and that all estimates of work done or claimed by him should be made

by the engineers, by virtue of said original contract, which was therein referred to and made part thereof, and the stipulations therein made stipulations between Simms and defendants except so far as they conflict. The original contract provided for monthly payments for work done, less 15 per cent., on the certificate of the said engineers. There is a material difference in these two contracts as to time of payment. In the first Underwood undertook to pay monthly for the work done, on the certificates of his engineers. In plaintiff's contract with defendants the latter contracted to pay for the work done in a calendar month, on or before the fifteenth or twentieth of the next month. The meaning of these contracts is clear. Defendants could demand payment from Underwood at the end of each month on the certificate of the engineers. In their contract with Simms they contract to pay him 15 or 20 days later, with the evident purpose of giving them time to get said certificates, and inspect the work and verify the same.

It is contended that these contracts are to be construed to mean that Simms was to be paid after the middle of the month, tion for work done in the preceding month, only on presentation of the certificate of Underwood's engineers of the amount of work he had done. We do not think the contract can bear that construction. Defendants had agreed to monthly estimates and payments to them by Underwood, on the certificate of the engineers, and they also agreed to pay Simms the fifteenth or twentieth of the month for work he had done. This gave them 15 or 20 days after they could put Underwood in default before they were to be called on by Simms, and the terms were made evidently for that purpose. It is a stretch of construction to hold that Simms, before he could put defendants in default, should get the certificate of the engineers of the other party to the original contract, and with whom he had no contract, and upon whom he could not call for estimates, and by doing so put them in default. There was no privity of contract between Simms and Underwood. Defendants, on the other hand, could demand of Underwood that his engineers estimate the work, and certify the same, and, in default thereof, demand payment for the work done. The

contract by defendants with Simms was that they would pay him, on the fifteenth or twentieth of each month, for work he had done in the preceding month, and it was for them to secure the certificate of work done. On the twentieth day of each month, therefore, there was due Simms the amount of work done by him in the preceding month, at the contract price, less 15 per cent. He then had a right of action therefor.

The statute (Comp. Laws, § 3450) provides that "interest shall be allowed * * * on all moneys after they become due on any bond, bill, promissory note, other instrument in writing." It is insisted that the contract beween plaintiff and defendant is not an "instrument in writing" contemplated by statute. It was held, under a similar statute, that a written contract for the construction of a building was an "instrument in writing," and that interest should be allowed from the time payments became due. *Downey* v. *O'Donnell,* 92 Ill. 559. A plain reading of the words of the statute leads to no other construction.

The evidence shows that estimates of the work done in each month were made by the engineers, and certified and their correctness has never been called in question by defendants, and there is evidence that they knew of them at the time. They certainly might have known, and the law in this case must presume that they knew of them until the contrary appears. They made payments, from time to time, based upon them, and Underwood had contracted to furnish them to defendants.

The only other question in the case is as to whether there was an accord and satisfaction of the indebtedness. On this point there is a flat conflict in the evidence between plaintiff and one of the witnesses; but, as the jury found for plaintiff, we must assume the facts to be as plaintiff testifies. It appears that on April 7, 1884, one of the defendants deposited $12,-815.65 in a bank, to be placed to the credit of plaintiff. Plaintiff was absent at the time, and knew nothing of it. On that date one of the defendants wrote Simms: "I have this day deposited to your credit $12,815.65, being full amount due for work, etc. Please send receipt in full." It does not ap-

pear that Simms received this letter before he received that sum. As a postscript to the letter directing the bank to credit Simms, defendants wrote: "Don't place this to credit unless he sends receipt in full." Bank did place the amount to Simms' credit. When Simms returned, he asked the bank for a statement of the account, and saw his credit. The cashier then told him defendants required a receipt in full. This he declined to give, saying they owed him more, which he insisted upon. He then drew out his balance. We do not think this to be a satisfaction of the debt. The bank, for the purposes of this transaction, was the agent of defendants and we must treat what occurred as though Simms had been dealing with them. The money had already gone to his credit, and they asked for a receipt in full, which he refused to give, saying they owed him more. Then he was permitted to draw out the money. Simms expressly refused to satisfy the debt, and we do not think his drawing out the money under the circumstances a release.

This disposes of all the questions in the case of sufficient importance to require our attention.

The judgment is affirmed.

[Civil No. 170. Filed January 19, 1887.]

[S. C. 12 Pac. 694.]

E. O. FECHET, Plaintiff and Respondent, v. CHARLES P. DRAKE, Assignee, Defendant and Appellant.

1. MORTGAGES—ELECTRIC LIGHT PLANT—POLES AND WIRES AS FIXTURES—FIXTURES DEFINED—EXCEPTIONS IN FAVOR OF TENANTS AND TRADE DO NOT CHANGE RULE—QUICQUID PLANTATUR SOLO, SOLO CEDIT REMAINS THE RULE AS BETWEEN VENDOR AND VENDEE AND MORTGAGOR AND MORTGAGEE—A CHATTEL MAY BE A FIXTURE THOUGH OFF THE LAND—MORTGAGE CONVEYED LOT WITH MACHINERY AND APPURTENANCES—LANGUAGE COVERED ELECTRIC CURRENT AS APPURTENANCE EVEN THOUGH NOT A FIXTURE—WHETHER CHATTEL BE FIXTURE OR APPURTENANCE IN EACH CASE CONCLUSION IS MIXED ONE OF LAW AND FACT TO BE DETERMINED FROM INTENTION OF PARTIES AND USES TO WHICH CHATTEL IS DEVOTED—IN THIS CASE CHATTEL BECAME PART OF REALTY AND

PASSED WITH MORTGAGE.—An electric light plant was placed upon a certain lot and poles and wires for the purpose of delivering the current generated thereby were placed upon the streets of the city. The lot was mortgaged, "together with all machinery, including the boiler, engine and dynamo now situated on said land, and together with all and singular the tenants, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining." It is urged that the said wires are a fixture to the lot, and as such pass with the mortgage A fixture is an article which was a chattel, but which, by being physically annexed or affixed to the realty, became accessory to it, and a part and parcel of it. The fact that there are exceptions to the rule in favor of tenants as against landlords, and in favor of trade, does not change the definition. *Quisquid plantatur solo, solo cedit,* the maxim of the common law, as between vendor and vendee, and mortgagor and mortgagee remains today unchanged. The later and better doctrine does not require an actual fastening to the soil as essential to making a chattel a fixture. It may be a fixture even though off the land. The electric current is an appurtenance to the machinery situated on the lot, and is therefore covered by the language of the mortgage even though not a fixture. Whether a particular chattel has become a "fixture" or an "appurtenance" is a mixed question of law and fact, largely to be determined by the intention of the parties, and the uses to which the chattel is devoted. In this case it was the evident intention of the parties to make this electric current a part of the machine mortgaged and attached to the land,—to become a part of the realty. Held that the chattel so attached passed with the mortgage.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Affirmed.

The facts are stated in the opinion.

Hereford & Lovell, and T. L. Stiles, for Appellant.

If this circuit passed, under the mortgage at all, it did so either as a fixture or an appurtenance. It was not an appurtenance. The term "appurtenance" refers only to the incorporeal right to use a thing upon, or in connection with land. Hilliard on Real Property, II, 357. But machinery is never an "appurtenance". When it is so nearly identified with the land as to become a part of it, it is called a fixture. Here, however, we maintain that no case can be found where

what would be a "fixture" upon land, has been held to be so when it is found or used off the land. The definition of a fixture by the Civil Code of California, Section 660, which is declaratory of a common law "fixture", is as follows: "A thing embedded in it (*i. e.* land), as in the case of walls, or permanently resting on it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws." See *Buckout* v. *Swift*, 27 Cal. 433, 87 Am. Dec. 90. From *Stillman* v. *Flannigen*, Iowa Dec. 1881, Albany Law Journal, Vol. 25, p. 417, we quote what is the established general rule: "Things personal in their nature, but fitted and prepared to be used with real estate, and essential to its beneficial enjoyment. being on the land at the time of its conveyance by deed, pass with the realty. The rule is the same whether the sale is by the owner, or by a public officer under the law." But this rule is not always followed with strictness. See Overton on Liens, pp. 416-7; *Teaff* v. *Hewitt*, 1 Ohio St. 511; Albany Law Journal, Vol. 24, p. 302; *Coburn* v. *Ames*, 52 Cal. 385, 28 Am. Rep. 634; Jones on Mortgages, Sec. 1462.

Alex. Campbell, and C. C. Stephens, for Respondents.

A bill to quiet title can be maintained for any kind of personal property which possesses a *quasi* real character; such property as would be known as mixed property at common law. Boone on Mortgages, Sec. 104, p. 140; Ewell on Fixtures, pp. 20, 21, 22, 46, 47, and 49; 3 Wait's Actions and Defenses, Chap. 69, p. 368, and *seq;* 1 Jones on Mortgages, Secs. 441, 444, 446, 448, and especially 450, 451; *Sands* v. *Pfeiffer*, 10 Cal. 259; *Merritt* v. *Judd*, 14 Cal. 59; *Hawes* v. *Lathrop*, 38 Cal. 493; *Fratt* v. *Whittier*, 58 Cal. 126 and 130. As to what is actual annexation to the realty or something appurtenant thereto, we fill the requirement. As to the uses or purposes to which that part of the realty with which it is connected is appropriated, we fill that requirement exactly. As to the intention of the party making the annexation to make a permanent accession to the freehold, we fill that requirement exactly and completely. These are the three great tests. Counsel for defendant called for an authority

where that portion of the machinery used to communicate power ever passed with the realty. We furnish it with the citation of several authorities on page 142 of Boone on Mortgages; *Keeler* v. *Keeler,* 31 N. J. Eq. 181; *Ottumwa Woolen Mill Co.* v. *Hawley,* 44 Iowa, 57, 24 Am. Rep. 719; *Coleman* v. *Stearns Mfg. Co.,* 38 Mich. 30; *City of Brooklyn* v. *Nodine,* 26 Hun. 514; Boone Real Prop. Sec. 9.

BARNES, J.—Plaintiff in this case seeks to quiet title to real estate mentioned in his complaint. He derives his title from a judgment sale under a decree of foreclosure of a mortgage. The mortgage was executed August 8, 1883, and the sheriff's sale under a decree of foreclosure was made June 2, 1885, and, after time of redemption had expired, a deed was executed and delivered. On April 1, A. D. 1885, defendant became the assignee in insolvency of the mortgagee.

The question in this case is whether the property in question passed by the mortgage, or remained in the mortgagor, and passed by the assignment, under the insolvency proceedings, to defendant, Drake. The record shows that an electric light company had been organized, and was engaged in lighting the city of Tucson by that means; that in 1883 the company purchased lot 2, in Tucson, of one Wilkins, for the purpose of placing and constructing an electric plant thereon so as to light said city thereby; that, after the purchase of said lot, such plant was constructed, including boilers, engines, dynamo, and, as a necessary, integral, and ordinary part of such plant, there was erected in the streets of the city 18 masts, and wires were strung thereon, along which the electric light current ran so as to conduct the same to the electric lamps located in the different parts of the city, and so light the same. The said wires, so strung, were attached to the building on said lot, and to the dynamo therein, and thereby the current was completed. To cut the wires, or by any means destroy such connection, rendered the whole plant useless for that purpose. The mortgagee conveyed said lot, "together with all machinery, including the boiler, engine, and dynamo now situated on the said land, and together with all and singular the tenements, hereditaments and appurte-

nances thereunto belonging, or in anywise appertaining." The only question here is whether, by this mortgage, there passed to the mortgagee the wires so strung along said masts. Defendant insists that the same did not pass, and that he may cut such wires, and treat the same as the personal property of the mortgagor. Plaintiff insists that the whole plant, including the wires so strung, passed by the mortgage.

This raises a very important question. It is urged that the said wires are a fixture to the lot, and as such pass by the mortgage. There is great confusion in the books in the definition of the term "fixtures." It is held to denote "such articles of a chattel nature as, when once annexed to the realty, may not be removed by the party annexing them, as against the owner." Ewell, Fixt. 1, and cases cited. On the other hand, just the reverse is held to be the true definition; that is, chattels annexed that may be removed, etc. Ferard, Fixt. 2, and cases cited. It is difficult to determine in which of the above senses it is most frequently employed.

"A fixture is an article which was a chattel, but which, by being physically annexed or affixed to the realty, became accessory to it, and a part and parcel of it." This definition is sustained by all the authorities. Amos & F. Fixt. 11. "Things fixed in a greater or less degree to the realty." 2 Kent, Comm. 345, note *a*. "Anything annexed to the freehold." 2 Smith, Lead. Cas. 239, note. In *Teaff* v. *Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634, the court discuss this whole question: "The term 'fixture', in the ordinary signification, is expressive of the act of annexation, and denotes the change which has occurred in the nature and legal incidents of the property; and it appears to be not only appropriate, but necessary, to distinguish this class of property from movable property possessing the nature and incidents of chattels."

The fact that there are exceptions to the rule in favor of tenants as against landlords, and in favor of trade, does not change the definition. *Quicquid plantatur solo, solo cedit*, was the maxim of the common law; and, as between vendor and vendee, and mortgagor and mortgagee, remains to-day unchanged. Co. Litt. 53; 2 Smith, Lead. Cas. 114; 2 Kent, Comm. note *a*, 345; *Elwes* v. *Maw*, 3 East, 57. Whichever definition may be regarded best, all concur that, where the

chattel is "fixed" or "annexed" physically to the soil, it becomes a part of the realty.

The electric light current was affixed to the soil as firmly as the nature thereof would permit. It was attached physically to it, and became a part of the fixed machinery. To that extend this electric light current is a fixture. But is is contended that, while this is so, yet that a fixture must be on the land, and that that may not be a fixture which is off the land.

A case is cited holding that, where an engine was on one lot, and connected with a machine on another lot, that the machine on each lot is a fixture on the lot on which it is constructed. *McDonald* v. *Minneapolis Lumber Co.*, 28 Minn. 262, 9 N. W. 765. That is not this case. Here one lot is devoted to the maintenance of an electric light plant. Upon it are erected buildings, and in them are placed motive power and dynamo by which an electric current is to be created, and from the same led by means of wires annexed thereto, and running out of the building, strung on poles set up in the streets of the city, through the city, to points where this light is needed, and, returning by the same means, are so connected with the dynamo as to complete the circuit, and so make effectual the operation of a machine of which it is an integral and necessary part. It has a "right of way" along the streets of the city, which is no more than a mere license, and the license is subject to the public use of the streets, and in no way affects the fee to the same. Such use of the streets is a public use, and the power to grant such use is to be found in the same powers that grant the use of the streets to railway companies, gas companies, water companies, and the like. The mortgage or sale of a railway would carry its tracks laid in or across a highway annexed to its tracks, on its exclusive right of way, or even its locomotives and cars thereon. Rolling stock of a railway is a part of the realty where a railroad is mortgaged, though used on lines not included in the mortgage. *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, and see note to this case.

The later, and we think the better, doctrine does not require an actual fastening to the soil as essential to making a chattel a fixture. The third rule stated by Mr. Carpenter (2

Wall. 646) is sustained by these authorities: "If the thing be essential to the use of the real estate, and has uniformly been used with it, then it passes, though not fastened to it." *Farrar* v. *Stackpole,* 6 Greenl. 157, 19 Am. Dec. 201; *Snedeker* v. *Warring,* 12 N. Y. 170; *Pierce* v. *Emery,* 32 N. H. 484; *Minnesota Co.* v. *St. Paul Co.,* 2 Wall. 609; *Peoria etc. R. R. Co.* v. *Thompson,* 103 Ill. 209.

The electric current, including wires, poles, insulators, and appliances, was an essential part of the machine. To sever it was to destroy it. The object of the law is to preserve, and not to destroy. A machine made of many parts, operated for a useful purpose, may have great value. Sever the parts, and they are each comparatively worthless. And it is the duty of the courts, so far as may be, to so construe the law that the usefulness and value of such property be maintained. In *Regina* v. *North Staffordshire Ry. Co.,* 3 El. & El. 392, Lord Cockburn held that telegraph apparatus, consisting of posts driven into the ground, and wires passing through sockets annexed to the posts, but which wires might be disconnected from the posts without injury, or displacing them, were a part of the appliances of the defendant railway company, and were fixtures, as they were so attached that it was intended that they should remain permanently connected with the railway, or the premises used with it, and remain permanent appendages to it as essential to its operation. Such is this case.

We have so far considered this as though it were an ordinary conveyance of the lot, but the mortgage conveyed the lot, "together with all the machinery, including the boiler. engine, and dynamo now situated on said lot, and together with all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining."

In *Pickerell* v. *Carson,* 8 Iowa, 544, a sale of "the fixtures and appurtenances contained in the daguerreian rooms," etc., embraced all such property as was used in carrying on the business, such as maps, pictures, stove, carpet, apparatus and furniture, machines and stock, as appurtenances, and sky-light, balcony, partition, etc., as fixtures.

The electric current is, then, an appurtenance to the machinery situated on that lot, and is therefore covered by the

language of the mortgage, even if not a fixture. Extra rolls in a rolling-mill, removable at pleasure, were held to be a part of the realty as appurtenant to it. *Pyle* v. *Pennock*, 2 Watts & S. 390, 37 Am. Dec. 517. A statue and a sun-dial also. *Snedeker* v. *Warring*, 12 N. Y. 170; *Wadleigh* v. *Janvrin*, 41 N. H. 503, 77 Am. Dec. 780. A mortgage of a railway, with its appurtenances and franchises, includes its rolling stock, tools, and all movable property used in its operation. *Peoria etc. R. R. Co.* v. *Thompson*, 103 Ill. 209.

The ingenuity of invention, creating new appliances for usefulness, constantly brings new facts for the consideration of the courts; and to these established principles must be applied. To determine whether a particular chattel has become a "fixture" or an "appurtenance" we must be guided by authority. A consideration of the authorities leads to the conclusion that in each case it is a mixed question of law and fact, largely to be determined by the intention of the parties, and the uses to which the chattel is devoted. In this case it was the evident intention of the parties to make this electric current a part of the machine mortgaged and attached to the land,—to become a part of the realty. We hold, therefore, that the chattel so attached passed with the mortgage.

The judgment is affirmed.

Porter, J., concurs.

[Civil No. 188. Filed January 24, 1887.]

[S. C. 12 Pac. 671.]

THE TERRITORY OF ARIZONA, EX REL. BRIGGS GOODRICH, Atty. Gen., Petitioner, v. W. C. BASHFORD, Treasurer of Yavapai Co., Respondent.

1. OFFICERS—COUNTY TREASURER—CUSTODIAN OF PUBLIC FUNDS—TRUSTEE FOR THE BENEFIT OF WHATEVER BRANCH OF THE GOVERNMENT MAY HAVE FUNDS WITH HIM—FAILURE TO PAY OVER FUNDS SUBJECTS HIM AND SURETIES TO ACTION—LAWS OF 1883, p. 157—TERRITORY AND COUNTY EACH HAVE RIGHT OF ACTION ON BOND—SHORTAGE IN GROSS FUND BELONGING TO BOTH TERRITORY AND

COUNTY—EQUITY REQUIRES THAT EACH SHOULD BEAR ITS PROPORTION OF THE LOSS.—The county treasurer is a county officer, and for some purposes he is the agent of the county, but as to funds in his hands he is, in the same sense, an agent of any branch of the government whose funds he may have. He is rather the custodian of funds which he may have officially, and the trustee for the benefit of whatever branch of the government may have funds with him. A failure by the treasurer to pay over funds to whomsoever has the legal right to receive them will subject him and his sureties to action, "by the territory, or any person injured or aggrieved." Statute, *supra*. The territory and county have each the right to recover on his official bond. Where the present treasurer has in his hands a gross sum less than the amount due both territory and county, and the shortage is due from his predecessor who defaulted, equity requires that each should bear its proportion of the loss.

MANDAMUS. Petition granted.

Briggs Goodrich, Atty. Gen., for Petitioner.

Herndon & Hawkins, for Respondent.

BARNES, J. This is a petition for a writ of *mandamus* requiring the treasurer of Yavapai to turn over to the treasurer of the territory moneys alleged to be in his hands belonging to the territory. It appears that the present treasurer went into office the first of January, 1887, and that he received, as funds in the hands of his predecessor, the sum of $57,230.88, which he now holds. It also appears that the amount of money which should have been turned over to him is $65,108.76, of which the amount due the territory would have been $16,108.07, and the amount due the county of Yavapai would have been $49,604.69, so that there is a balance still due from the late treasurer to the defendant of the sum of $8,481.88. It was urged that the court should be paid the full amount of $49,604.69 and that the balance of the $57,230.88 be paid to the territorial treasurer. It is also urged that the shortage of $8,481.88 should be apportioned between the territory and county, and it is urged by the attorney general that the territory should be paid in full, and that the county should

bear the loss. It is true that the county treasurer is a county officer, and that his bond is aproved by the board of supervisors of the county. For some purpose, he is the agent of the county, but as to funds in his hands he is, in the same sense, an agent of any branch of the government whose funds he may have. He is rather the custodian of funds which he may have officially, and the trustee for the benefit of whatever branch of the government may have funds with him.

A failure by the treasurer to pay over funds to whomsoever has the legal right to receive them will subject him and his sureties to action "by the territory, or any person injured or aggrieved." Acts 1883, p. 157. His bond is made payable to the territory. The territory and county have each the right to recover on the official bond of a county treasurer for money in his hands due either. In this case we have a gross sum in the hands of the present treasurer. He can be compelled to account for no more than the funds in his posssession. The gross sum falls short of the amount due the county and territory. The amount so short is due from the late treasurer. It is manifestly unjust that the whole of his shortage should fall upon either. Equity requires that each should bear its proportion of the loss, and each can enforce its rights against the late treasurer for the balance due. Of taxes collected, it appears that the territory is entitled to sixty-five and one-half cents out of every three dollars. Treating the amount in the hands of the treasurer at this time as money collected, there is due the territory $12,495.40, which is the amount the defendant will be required to pay to the territorial treasurer.

PORTER, J., concurs.

[Civil No. 187. Filed January 27, 1887.]

[S. C. 12 Pac. 730.]

TERRITORY OF ARIZONA, EX REL. CHARLES E. SHERMAN, Petitioner, v. BOARD OF SUPERVISORS OF MOHAVE COUNTY et al., Respondents.

1. COUNTIES—LOCATION OF COUNTY SEAT—LAWS 1885, ACT NO. 22, p. 20 PROVIDING FOR LOCATION BY VOTERS OF COUNTY VALID.—Statute, *supra*, enacts that the county-seat shall be where the voters designate. Such laws have been acquiesced in by the courts and the law makers too long now to question their validity.

2. LOCAL OPTION LAWS—VALIDITY.—The tendency of authority and practice is evidently toward a recognition of their validity. Fence laws, stock laws, liquor laws, in fact a great number of local option laws, have been enacted and sustained by the courts.

3. REMEDIES—ELECTION CONTEST—MANDAMUS NOT PROPER REMEDY.—Mandamus is not a proper remedy to contest an election.

4. MANDAMUS—SCOPE OF—DEFINED BY COMP. LAWS 1877, p. 480, par. 2905.—Our statute seems to have codified the law of this subject. Mandamus may be issued "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled." Statute, *supra*.

5. ELECTION CONTEST—ALLEGATIONS REVIEWED AND HELD INSUFFICIENT—QUALIFICATIONS OF VOTERS—NECESSITY FOR REGISTRATION—COMP. LAWS 1877, p. 237, par. 1412 CITED—POLLING PLACE IN IMPROPER PLACE—RETURNS NOT PROPERLY TRANSMITTED—OBJECT OF ELECTIONS—MERE IRREGULARITIES NOT AFFECTING RESULT WILL NOT BE CONSIDERED.—The petition fails to make out a case for a contest of the election. It is alleged that certain persons voted who are not shown to be citizens on the great register. In this territory a person who has declared his intentions to become a citizen is a qualified voter. Statute, *supra*. A qualified voter may vote in any precinct in the county. *Idem, supra*. If the polling place of an election be on an Indian or military reservation, where the place was well known, and no interference with the election be alleged, it cannot invalidate the election. Allegations that the returns were not properly transmitted cannot avail, without allegation that they were tampered with. It is the object of elections to ascertain a free expression of the will of the voters, and no mere irregularity can be considered, unless it be shown that the result has been affected by such irregularity.

MANDAMUS. Petition denied.

The facts are stated in the opinion.

E. M. Sanford, for Petitioner.

Rush, Wells & Howard, for Respondents.

BARNES, J.—By statute approved February 25, 1885, it was enacted that the qualified voters of Mohave county should, at the next general election, designate by ballot the locality for the county-seat of said county; that at said election any voter might designate upon his ballot a place for such county-seat, and that all such votes should be received, counted, and returned as other votes; and that the place receiving the highest number of votes should be the county-seat. All acts in conflict with that act are hereby repealed.

The petition, on the relation of Charles E. Sherman, alleges that at the last general election votes were cast in Mohave county on the question of the location of the county-seat, and that the board of canvassers canvassed the votes cast, and declared that Kingman had received a majority, and that thereupon the county officers—the sheriff, county judge, and others—removed their offices and the records of the county to Kingman. The petition alleges that many votes were cast by persons not citizens, and therefore not legal voters; that many votes were cast by persons who resided in precincts other than where the votes were cast, and so were illegal votes. Many irregularities in making up, certifying, and in transmitting the returns are alleged. The petition asks for a writ of *mandamus* requiring the board of canvassers to again canvass the returns of said election. It also asks the court to inquire, by issues prepared and sent down to the district court, into the legality of the votes alleged to be illegal, and to purge the returns of said election of all illegal votes and irregularities before the board of canvassers be required to canvass such returns. In short, it is sought by this proceeding to contest this election.

One question we must dispose of at the threshold. It has been urged with great force and ability that the law authorizing the election is invalid, in that it attempts to delegate legislative powers to the voters of Mohave county. The location of a county-seat should be determined by the people of a county. Their interests and convenience should alone be consulted. So, in most of the states, laws have been enacted by which a vote of the people should determine the question.

No case has been cited that decides such laws to be invalid. They have been acquiesced in by courts and the law-makers too long now to question their validity. The case of *Calaveras Co.* v. *Brockway*, 30 Cal. 326, treats such a law as valid. So do the cases of *State* v. *Stearns*, 11 Neb. 104, 7 N. W. 743; *Boren* v. *Smith*, 47 Ill. 482. It has been held that where the fact of an enactment becoming a law is made to depend upon a popular vote, the law is invalid. *Barto* v. *Lovett*, 8 N. Y. 483, 59 Am. Dec. 506, where a school law made dependent upon the adoption by the people, and *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425, where a prohibitory law made dependent upon adoption by vote, are cases that held such laws to be void.

Much authority may be found *pro* and *con* upon this vexed question, yet the tendency of authority and practice is evidently towards a recognition of their validity. Fence laws, stock laws, liquor laws, in fact a great number of local option laws, have been enacted and sustained by the courts. But the law in this case is not made dependent upon a vote. It enacts that the county-seat shall be where the voters designate, and repeals all laws in conflict therewith. We are compelled to hold that the law is valid.

The next question to be considered is whether *mandamus* is the proper remedy. The purpose of this remedy is to require public officers to perform their official duties when, by inaction or misconduct, they refuse to act. When the duty is purely ministerial, the court may direct how the duty shall be performed. When, however, the officer has any discretion or judicial power, the court can only direct him to act, but not how he shall act. Had the board of canvassers refused to canvass the votes cast at the election on the location of the county-seat, this remedy might have been invoked to require such canvass. Had the county officers failed to remove, the court would have had the power to direct the removal. But the petition shows that the canvassers performed their duty by canvassing the votes, and the officers by removal. The case stands as if a person had been declared elected to an office, and he had been inducted into the office, and this remedy was asked to require him to surrender the office, and the canvassers to reconvene, and again canvass the returns and

declare the result. This cannot be sustained by authority. High, Extr. Rem. § 49. "The rule may now be regarded as established by an overwhelming current of authority that, where an office is already filled by an actual incumbent, exercising the functions of the office *de facto* and under color of right, *mandamus* will not lie to compel the admission of another claimant, nor to determine the disputed question of title." McCrary on Elections is to the same effect (section 317 *et seq*); and see cases cited by both authors; *State* v. *Churchill,* 15 Minn. 455, (Gil. 369); *People* v. *Detroit,* 18 Mich. 338; *Clark* v. *McKenzie,* 7 Bush. 523; *Burke* v. *Monroe Co.,* 4 W. Va. 371; *People* v. *New York,* 3 Johns. Cas. 79. *State* v. *Stearns,* 11 Neb. 104, 7 N. W. Rep. 743, was a case where canvassers were directed to canvass all the returns, and not exclude a part of them. *Glencoe* v. *People,* 78 Ill. 389, is a case where, by *mandamus,* the town officers were directed to call an election required by law. *State* v. *Walker,* 5 S. C. 263, is a case where *mandamus* was held to be a proper remedy to compel a sheriff to keep his office at a county-seat. But no case has been cited which holds that in *mandamus* the court may go behind the certificate of the board of canvassers, and contest the election. Our statute seems to have codified the law of this subject. *Mandamus* may be issued "to compel the performance of an act wihch the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled."

But the petition fails to make out a case for a contest of the election. It is alleged that certain persons voted who are not shown to be citizens on the great register. In this territory a person who has declared his intention to become a citizen is a qualified voter. Comp. Laws 1214. By the laws of this territory a qualified voter may vote in any precinct in the county. Comp. Laws 1214. If the polling place of an election be on an Indian or military reservation, where the place was well known, and no interference with the election be alleged, it cannot invalidate the election. True, the election at that place might have been prevented by the officers in charge, but there is no allegation that objection was made. Allegations that the returns were not properly transmitted

cannot avail, without allegation that they were tampered with. It is the object of elections to ascertain a free expression of the will of the voters, and no mere irregularity can be considered, unles it be shown that the result has been affected by such irregularity. McCrary, Elec. 128, and Brightly, Elect. Cas. 448, and cases cited.

For these reasons the petition is denied.

Porter, J., concurs.

[Civil No. 186. Filed July 1, 1887.]

[S. C. 14 Pac. 300.]

THE UNITED STATES, Plaintiff and Respondent, v. N. ELLIS et al., Defendants and Appellants.

1. APPEAL AND ERROR—ABSTRACT—PRESUMPTION—WHERE EVIDENCE OBJECTED TO IS NOT SET FORTH IN ABSTRACT OBJECTIONS THERETO WILL NOT BE CONSIDERED.—Where the abstract does not set forth the documents to the admision of which objection was made below this court must presume that they were correctly received, and cannot consider alleged error in the ruling of the trial court.

2. EVIDENCE—DOCUMENTS OF WAR DEPARTMENT PROPERLY AUTHENTICATED EVIDENCE—REV. ST. U. S. 1878, § 886, CITED.—Copies of documents from the quartermaster's department of the war department properly authenticated by the auditor of the treasury are made evidence by § 886 of the revised statutes, *supra*.

3. ARBITRATION—WHERE CONTRACT CALLS FOR ARBITRATION—PARTIES MUST SEEK THEIR REMEDY UNDER ITS TERMS—DECISION OF ARBITER CONCLUSIVE IN ABSENCE OF FRAUD OR MISTAKE.—Where the parties, by the terms of the contract, agree upon an arbitrator or other person to construe the contract and fix and determine obligations under it, parties must seek their remedy according to the terms of the contract, and those terms will be enforced in all cases in the absence of fraud, bad faith or mistake clearly made to appear.

APPEAL from a judgment of the District Court of the Third Judicial District in and for the County of Yavapai. Affirmed.

The facts are stated in the opinion.

Clark Churchill and H. N. Alexander, for Appellant.

The court erred in taking the case from the consideration of the jury and ordering them to bring a verdict for the plaintiff. The United States as a litigant stands on the same plane as an individual, and is subject to the same laws, rules, procedure and practice as other litigants.

The United States as a contractor is subject to the same laws, rules and constructions governing contracts as any other contracting party. Case of the Siren, 7 Wall. 152-4; *United States* v. *Ringgold,* 8 Pet. 150. One rule governing contracts, *i. e.* that in all cases whatever a promissor will be discharged from all liability when the non-performance of his obligation is caused by the act or fault of the other contracting party. Parsons on Contracts, Vol. 2, pages 523, 676; *Hudson Canal Co.* v. *Parma Coal Co.,* 8 Wall. 288, 289; *United States* v. *Peck,* 102 U. S. 64.

When there is evidence which in any way tends to establish the plaintiff's cause of action, or the defendant's case, it is erroneous for the court to withdraw the case from the jury, or direct a verdict; it is not for the court to judge of the sufficiency of the evidence. Proffat on Jury Trials, Sec. 355, page 421; *Schuchardt* v. *Allen,* 1 Wall. 359, 371; *Drakely* v. *Gregg,* 8 Wall. 268; *Hickman* v. *Jones,* 9 Wall. 201; *Barney* v. *Schneider,* 9 Wall. 248, 251, 253; *Utica Insurance Co.* v. *Badger,* 3 Wend. 103; *New York Ins. Co.* v. *Walden,* 12 John. 514, 518.

Owen T. Rouse, U. S. Dist. Atty. (Herndon & Hawkins, of counsel) for Respondent.

The contract among other things provides as follows: "Should any objection be made to the action of the officer designated to inspect and receive the barley, the case will be decided by a board of officers, subject to the approval of the Department Commander."

Where the parties in their contract fix on a certain mode by which the amount to be paid shall be ascertained, the party

that seeks an enforcement of the agreement must show that he has done every thing on his part which could be done to carry it into effect. *United States* v. *Robeson*, 9 Pet. 319.

The evidence failed to show that Ellis at any time called on any officers or any board to pass upon the quality of the barley after it had been rejected. Therefore he did not avail himself of the terms of his contract or "do every thing on his part which could be done to carry it into effect."

BARNES, J. This is a suit by plaintiff on a bond to secure a contract made by Nathan Ellis, defendant, to deliver barley to the assistant quartermaster of the United States army at Fort McDowell, Arizona. Plaintiff recovered a judgment for the full penalty of the bond, to wit, $500, and defendant brings the case into this court for review. The abstract shows that plaintiff offered in evidence a certified copy of the bond sued on and of the contract for the delivery of the barley aforesaid, and also certified copies of certain vouchers marked "Exhibits E, F, and G," and copies of other documents from the quartermaste's department from the files of the war department, which seem to have been duly certified by the proper officers of the United States treasury. The abstract does not set out nor state the contents of either the bond sued on or the contract, or either one of the exhibits to which objection is made.

We must presume that the court below ruled correctly in admitting them. Before we can hold that the court below erred, that must clearly appear, and we cannot consider in this court objections to evidence or documents that were offered below unless they are contained in the abstract, so that the court can see what the action of the court and what the evidence was that was objected to.

This disposes of all the objections in the case that we should or can properly consider; but we have, notwithstanding this fact, looked into the record, and find that all these documents and vouchers were properly authenticated by the proper auditor of the treasury having charge of the accounts of the war department, and are made evidence by virtue of section 886 of the Revised Statutes. These authenticated copies make

out a *prima facie* case, and it devolves, then, upon the defendant to defeat the same by competent evidence. It appears that there was a clause in the contract which provides that, in case of failure of said party of the second part thereto to comply with the stipulations of the contract, the party of the first part should have the power to purchase in open market and supply the deficiency, and the party of the second part was to be charged with the excess of cost, if any, over the rate specified in the contract. The contract also provided that deliveries should be made at such times and in such quantities as the acting assistant quartermaster at the station above named, or higher authority, might direct, subject to inspection by such officer or agent as the party of the first part might designate, and also provided that if any objection should be made to the action of the officer designated to receive and inspect the barley, that the case should be decided by a board of officers, subject to the approval of the department commander.

It seems that the defendant delivered at Fort McDowell between sixty and seventy thousand pounds of barley, and that the same was rejected by the inspecting officer at that post. By the terms of that contract, if the defendants were dissatisfied with the rejection of said barley, it was his duty and his right under the contract to call for a board of officers, according to the provisions of the contract, and have the case decided, as provided by the terms of the contract. This he did not do; and according to the terms of his contract, he cannot now raise the question as to the quality of the barley, and the fault of the officer in rejecting the same. In the absence of fraud or bad faith on the part of the officer under this contract, his action was final as between the plaintiff and defendant contractor; and the contractor's aonly remedy was the remedy provided by the contract,—an appeal to a board of officers according to its terms. The evidence shows clearly that no such appeal was made, and the court properly instructed the jury that, as a matter of law, the contractor was liable for the difference between the contract price and the price paid in open market by the officer for the barley, which was clearly more than the amount of the bond and the recovery in this case.

In the case of *Kihlberg* v. *United States*, is reported in 97 U. S. 398, where there was a contract for the transportation of stores between certain points, provided that the distance should be ascertained and fixed by the chief quartermaster, it was held that, in the absence of fraud, or such gross mistake as necessarily implied bad faith or failure to exercise honest judgment, the decision of the chief quartermaster was conclusive upon the parties.

It was held in *United States* v. *Robeson*, 9 Pet. 319, that, where parties to a contract fixed a certain mode by which the amount to be paid shall be ascertained, the party who seeks enforcement must show that he did everything on his part that could be done to carry that portion of the contract into effect.

Where the parties, by the terms of the contract, agree upon an arbitrator or other person to construe the contract and fix and determine obligations under it, parties must seek their remedies according to the terms of the contract, and those terms will be enforced in all cases in the absence of fraud, bad faith, or mistake clearly made to appear.

The judgment of the court below is affirmed.

WRIGHT, C. J., and PORTER, J., concur.

[Civil No. 168. Filed July 1, 1887.]

[S. C. 14 Pac. 299.]

G. BEN HENEY, Plaintiff and Respondent, v. THE COUNTY OF PIMA, Defendant and Appellant.

1. COUNTIES—CHARGE AGAINST—NOTARY'S FEE FOR ACKNOWLEDGMENT TO TAX DEEDS NOT A PROPER CHARGE.—Under statute making it the duty of the tax collector to execute and acknowledge deeds to property unredeemed, and to deliver same to chairman of the board of supervisors without charge, a notary cannot recover from the county for services performed in taking such acknowledgments at the request of the tax collector.

2. STATUTES CITED—LAWS 1885, ACT No. 102, p. 290, § 3—COMP. LAWS 1877, p. 333, par. 2002, 2003.

APPEAL from a Judgment of the District Court of the First Judicial District, in and for the County of Pima. Reversed.

The facts are stated in the opinion.

F. H. Hereford, for Appellant.

John Haynes and Thomas Mitchell, for Respondent.

BARNES, J. In this action plaintiff sues for the notarial fees for acknowledgment of 206 deeds, at one dollar each. He alleges thatt he tax collector of Pima county requested him to take and certify the acknowledgment of said deeds. The provision of the laow under which the deeds were made is an amendment to the revenue laws, which provides that in sales of lands for taxes when the territory is the purchaser, and no person has redeemed the property during the time allowed for its redemption, the collector shall execute and acknowledge a deed to the territory, of such property, and deliver the same to the chairman of the board of supervisors without charge, and it shall be the duty of the county recorder, without fee, to record the same. Laws. Ariz. 1885, p. 290, § 3. The tax sales above provided for are to enforce the tax for territorial as well as for county purposes. Comp. Laws, *c.* 33 §§1, 2. The feessought to be recovered against the county were earned in services to the tax collector, and at his request. The county did not request it. There is no express contract to bind the county, nor is there an implied contract by the county to pay for these services. It is essential to a contract, either express or implied, that both parties assent to it. The service performed was not for the sole benefit of thec ounty. The territory was equally benefited by it. The obligation of the county does not arise by operation of law. The law requires the tax collector to execute these deeds, and without charge. He requested these services and they were rendered for him in his official capacity. The law does not authorize him to bind the county, or to impose any such expense on the county. The law expressly says he shall not do so. If the county was to be charged for these services by its proper officers, it

should have the opportunity of selecting who should perform the service. If the tax collector assume to do so without authority or direction from the county, or its proper officers, he must assume the responsibility. The clerk of the county clerk and the recorder of deeds were authorized by law to take and certify these acknowledgments, and all fees earned by them are moneys of the county, as they are salaried officers. There is no reason why these officials should not perform this service; and if the tax collector passes them by, and requests the services of a notary public, he must pay him. It cannot be made a valid claim against the county.

The judgment is reversed, and the cause remanded for judgment for defendant.

WRIGHT, C. J. I concur in these views.

[Civil No. 206. Filed July 14, 1887.]

[S. C. 14 Pac. 356.]

J. D. PUTNAM, Plaintiff and Respondent, v. C. D. PUTNAM, Defendant and Appellant.

1. APPEAL AND ERROR—RIGHT OF APPEAL—ORDER AFFECTING A SUBSTANTIAL RIGHT—LAWS OF 1879, ACT NO. 48, p. 72, § 7, CITED—ORDER REFUSING TO DISSOLVE TEMPRORARY INJUNCTION NOT SUCH AN ORDER.—In a suit for an accounting between partners, where attaching creditors have intervened and upon issue joined as to whether chattel attached are partnership property the court has found against intervenors, such judgment, though not final, does affect a substantial right, and is appealable. An order refusing to dissolve a temporary injunction is a mere interlocutory order, in aid of the procedure of the cause, and affects no substantial right and is not appealable.

2. SAME—NECESSITY FOR MOTION FOR NEW TRIAL—FINDINGS CONCLUSIVE IN ABSENCE OF—PURPOSE OF—COMP. LAWS ARIZ. 1877, p. 438, par. 2630-2631, CITED—In the absence of a motion for new trial the findings of the trial court must be conclusive. It is the purpose of a motion for new trial to enable the court to look into the sufficiency of the evidence to sustain the findings. Statute, *supra*, cited.

APPEAL from a Judgment of the District Court of the Second Judicial District in and for the County of Pinal. Affirmed.

The facts are stated in the opinion.

Edwards & Chalmers, for Appellant.

H. B. Summers, (Goodrich, Smith, Street & Goodrich, of counsel) for Respondent.

BARNES, J. The sheriff of Pinal county, in order to satisfy execution in his hands against C. D. Putnam, levied upon certain cattle on the range as the property of said defendant, and on the sixth day of April, 1886, gave notice of sale of all the right, title, and interest of said defendant therein. Thereafter, but before the satisfaction of said execution. J. D. Putnam filed this bill, alleging that himself and said defendant were co-partners, doing business in the firm name of Putnam Bros., grazing cattle at large on the Gila and San Pedro rivers; that the cattle were branded "P;" that defendant had become indebted on account of transactions foreign to th partnership, and that judgment had been recovered against him. The above levy and sale was alleged. He alleged that the partnership was indebted to him in a large sum. He prays for a dissolution of the partnership, for an accounting, and for a distribution of the assets. He made the sheriff a party, and asked that he be enjoined from proceeding under execution, and a temporary injunction was issued restraining proceedings until further order of the court. The judgment creditors intervened, and denied the partnership. Issues were joined on the original bill of complaint and the bill of intervention. The cause was tried by the court without a jury, on the issue denying the partnership, and the court found that the partnership existed as alleged, and that the property levied upon was partnership property. The said sheriff and judgment creditors moved to dissolve the injunction theretofore issued, which said motion was overruled. The sheriff and the judgment creditor gave notice of appeal from the judgment, finding the issues as above, and from the

order refusing to dissolve the injunction. There is no final decree settling the partnership, and distributing the assets, and determining the rights of all the parties.

By the act of February 14, 1879, section 349 of the practice act of this territory was amended so as to provide that appeals may be taken from a final judgment in the district court, and from an order granting or refusing a new trial, *or which affects a substantial right in an action or special proceeding.* The words in italics are new. The appeal in this case is attempted to be prosecuted from two orders. One is the order which determines the issues raised by the intervenors and the sheriff in denying that a partnership existed between the two Putnams, and in asserting that the cattle levied upon were the separate property of the defendant in execution. This order, though not a final judgment, does affect a substantial right, and is such an order as may be appealed from. See *Gurney* v. *St. Paul*, 36 Minn. 163, 30 N. W. 661; *Fisk* v. *Henarie*, 15 Or. 89, 13 Pac. 760. The court found, as a matter of fact, that the two Putnams were partners, and that the property levied upon was and is partnership property. No motion for a new trial of these issues was made, and the findings must be conclusive. We cannot disturb them. Comp. Laws, §§ 2630, 2631. It is the purpose of a motion for a new trial to enable the court to look into the sufficiency of the evidence to sustain the findings.

The other order attempted to be appealed from is the order refusing to dissolve the temporary injunction. This was by no means a final judgment, nor was it an order affecting a substantial right. The object and purpose of the injunction was to hold the property until the final decree, which would settle all legal and equitable rights of all the parties before the court. The parties were before thec ourt, and this property was the subject-matter of controversy. One of the original subjects of equity jurisdiction is the settlement of partnership matters, and it is familiar principle that, where a court of equity once acquires jurisdiction of both the parties and the subject-matter of a controversy, it has jurisdiction to settle all legal as well as equitable rights. This had not in this case yet been done. The cause was undis-

posed of. Until final disposition it was the duty of the court to retain control of this property. In doing so no substantial right was affected. It was a mere interlocutory order, in aid of the procedure of the cause. Before the court makes a final decree in this cause the court must ascertain all the assets of the partnership; state the account between the partners; ascertain the debts of the partnership, if any. The assets must then be disposed of, by paying the partnership debts, of the balance distributing to the plaintiff his portion of the assets. The court may then determine what shall be done with the portion of the debtor partner. All these are matters for final determination in this case.

The judgment of the court finding the partnership and ownership of the property is affirmed. There can be no appeal from the order refusing to dissolve the temporary injunction.

WRIGHT, C. J. PORTER, J., concur.

[Civil No. 196. Filed August 18, 1887.]

[S. C. 14 Pac. 799.]

J. W. HOOPER, Plaintiff and Respondent, v. J. W. STUMP et al., Defendants and Appellants.

1. MORTGAGES—FORECLOSURE—DEFAULT IN PAYMENT OF INTEREST—COMP. LAWS ARIZ. p. 448, par. 2686, CITED.—Where a mortgage, on failure to pay the principal or interest, gives power to sell the premises and retain the principal and interest, on default in the payment of interest the mortgage may be foreclosed and the principal and interest recovered though the principal be not yet due. Statute cited, *supra*.

APPEAL from a Judgment of the County Court in and for the County of Cochise. Affirmed.

The facts are stated in the opinion.

Thomas Mitchell, for Appellants.

The only question is: Did the whole debt—principal and

interest—become due upon default in the payment of interest? The answer depends upon the contract between the parties. If they made such a contract the court must enforce it, but it is conceived that no court should go out of its way to discover such a contract by implication from doubtful words, but should require the intention of the parties to appear by plain language. The trial judge found such a contract in the language of the present mortgage, against his expressed views, upon the authority of *Bricknell* v. *Batchelder,* 62 Cal. 623. This case was decided by a divided court, by a majority of one, and is opposed by the case of *Williams* v. *Townsend,* 31 N. Y. 411. The latter case is the better on principle. We call attention to the terms of the note, which, being the principal thing, containing the obligation of the parties, and the mortgage a mere security to insure the performance of that obligation, ought to control. *R. R. Co.* v. *Sprague,* 103 U. S. 756. Conceding this point the judgment of the court is manifestly erroneous. Had the court found that only one year's interest was due, and directed a sale in the first place to pay that amount, with percentage and costs thereon, we could have stayed the sale by tendering this amount; or, if a sale had to be made, it would have been found that a portion of the mortgaged premises would have been sufficient to pay the amount. *Holden* v. *Gilbert,* 7 Paige (N. Y.) 208. The decree has deprived the defendants of both benefits.

Goodrich & Smith, for Respondent.

Sec. 250, Chap. 48, Com. Laws, has no application to this class of cases. It refers only to those cases where the debt is not all due. Here the contract provides that if the semi-annual interest is not paid as it becomes due, then the principal of the note becomes presently due. This is the contract that the parties have made. They must abide by it. Citation of authorities on such a point would be idle. There is no conflict upon such a question. We submit the question with a mere statement of the proposition.

PORTER, J. This is an action on a note, and to foreclose

a mortgage, upon non-payment of the interest on the note before the principal sum was due, the terms of which note and the mortgage in part are as follows:

"This conveyance is intended as a mortgage to secure payment of a certain promissory note of even date herewith, in words and figures as follows, to-wit: '$3,387.20.'

JULY 1, 1885.

" 'On or before two years after date we promise to pay J. W. Hooper or order at Los Angeles, California, three thousand three hundred eighty-seven twenty one-hundredths dollars, gold coin of the United States, for value received, with interest at the rate of one per cent. per month, payable semi-annually in like gold coin. J. W. STUMP.

"E. W. STUMP.'

"And these presents shall be void if such payments be made according to the tenor and effect hereof; but, in case default be made in the payment of the principal or the interest as provided, then the said party of the second part, his executors, administrators, and assigns, is hereby empowered to sell the said premises, and all and every of the appurtenances, or any part thereof, in the manner prescribed by law; and, out of the moneys arising from such sale, to retain the said principle and interest, together with the costs and charges of making such sale, and ten per cent. for attorney's fees; and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns."

The language is plain and can mean nothing else than, on failure to pay the *principal* or *interest,* power is given to sell the premises and *retain* such *principal* and *interest*.. If it were only to cover interest in default of payment of interest, why say to *retain* the *principal?* Such is the contract, and by it the parties must stand. We see no need of referring to authorities. In Jones on Mortgages, § 1177, it is said: "Default in the payment of the yearly or half-yearly interest at the times stipulated in the mortgage is held by high authority to give the right to foreclose immediately, although the period for payment of the principal sum has not arrived, and there is no provision specifically making a forfeiture of

the principal upon a default in the payment of the interest." In the same section reference is made to *Gladwyn* v. *Hitchman,* 2 Vern. 135, which says: "In this case a mortgage was made for £450, payable at the end of five years, with interest at the rate of 5 per cent. in the mean time. The interest not being paid as stipulated, the mortgage was treated as forfeited."

The right became absolute by non-payment of the interest, the condition not being fulfilled. *Dictum* of Lord Chancellor Sugden, Jones Mortg. § 1178.

The right to foreclose on non-payment of the interest was fully considered in *Brickell* v. *Batchelder,* 62 Cal. 623, and is conclusive of this case. Section 728 Code Civil Proc. Cal., is the same as section 2686 of our Complied Laws, and was the law of that state when *Brickell* v. *Batchelder* was decided. There may be notes payable at different dates, and no provision made for foreclosing all upon the others not being paid, and so the sections invoked (page 448, Comp. Laws) provide for sales for paying the amounts due. This is not the case before us, for, as said, the principal and interest shall be retained from proceeds of the sale.

Counsel for appellants rely on *Williams* v. *Townsend,* 31 N. Y. 411. There a provision was made for the payment of taxes by the mortgagor, but a purchase at tax sale was made for the mortgagee. The mortgagee commenced a foreclosure under the statute, by advertisement in one of the Buffalo papers. There was no part of the principal or of the interest due and unpaid, and before the day of sale mentioned in the advertisement the mortgagee paid to the proper officer the amount necessary for the redemption of the premises. The court says: "But no right to foreclosure would accrue upon a simple failure of the mortgagor to pay the taxes. To give that right it is essential that the holder of the mortgage shall have paid off and discharged the assessment or tax; otherwise no money has become due which the mortgagee is entitled to retain on a sale. The language of the mortgage settles this; for it provides that 'such *assessments, taxes* and *charges as shall have been paid by them' may be retained.*" It seems that if the mortgagor had paid the taxes, which was at his own option, according to the mortgage, he could

have foreclosed; but, as purchaser at the tax sale, the court says: "When, however, he purchases at a tax sale, and takes a certificate as purchaser, that is an election on his part to occupy the relation of purchaser with all the rights and incidents which the law attaches to it. He becomes then the owner of an undischarged lien, which the owner of the land may discharge in the manner provided by law."

The case of *Railway Co.* v. *Sprague*, 103 U. S. 756, cited by counsel, does not contravene *Brickell* v. *Batchelder*. The mortgage in the former case provided that, upon non-payment of interest for six months, the principal of the bonds should become due, whether *demanded* or *not*. The bonds declared, in case of non-payment of interest which had become due and *had been demanded,* if such default should continue six months after demand, the principal should become due. The court holds that the bonds being the principal obligation of the company, and the mortgage a mere security to insure its performance, the terms of the bonds should prevail. In the case at bar there is no conflict. The not says, when interest shall be due. The mortgage says, in addition, if interest be not paid when due, it shall be collected, and also the principal on such failure to pay the interest. The judgment is affirmed.

[Civil No. 177. Filed August 31, 1887.]

[S. C. 15 Pac. 273.]

E. O. CARLYON, Plaintiff and Respondent, v. J. C. FITZHENRY et al., Defendants and Appellants.

1. BAILMENT—GRATUITIOUS—DUTY OF BAILEE—AGREEMENT TO USE MONEY DEPOSITED—RELATION CHANGED TO DEBTOR UPON USE OF MONEY.—Where a bailee as matter of accommodation allows money to be deposited in his safe he is not responsible for the loss of the money through the robbery of the safe, being only bound to exercise the same care of the deposit as he is in the habit of bestowing on his own money; and if there be an agreement for the use of the money deposited the relation of debtor and creditor commences with the use, and if the robbery took place before that time the loss must fall upon the depositor.

2. TRIAL—INSTRUCTIONS TO JURY—IGNORING EVIDENCE.—Where the evidence tends to show that money was deposited with defendants by plaintiff for safe keeping and defendants requested the use of the money, if they needed it, but had not used it, an instruction to the jury that if they believed that defendants had made such request and that it was for the benefit of defendants then the relation of bailor and bailee was changed to debtor and creditor whether the money was in fact used or not was erroneous.

APPEAL from a Judgment of the District Court of the First Judicial District in and for the County of Cochise. Reversed.

The facts are stated in the opinion.

Thomas Mitchell, for Appellants.

In 1 Addison on Contracts, p. 530, (Am. Ed. Notes by Abbott,) it is said: "If a sum of money be bailed by one man to another, under circumstances fairly leading to the presumption that the bailee has authority from the bailor to use it or not as he may think fit, the bailee will stand in the position of a mere depository or he will be clothed with the increased duties and liabilities of a borrower, according as he may or may not have thought fit to avail himself of the privilege of user impliedly accorded to him. If he put the money in a coffer or a bag, and refrains from using it, and preserves its identity, with the intention or restoring it *in individuo* to the bailor, he undertakes the duty of a mere depository, and is bound only to take the same care of the deposit that he is in the habit of bestowing on his own money, and will not be for loss by robbery, fire or any other casualty. But if he were to mix the sum deposited with his own money, with the intention of restoring an equivalent, and so to destroy the identity and individuality of the subject matter of the bailment, this would be a user of the money, which would at once alter the nature and character of the bailment converting it into a loan for use and consumption, with its increased duties and responsibilities."

The above seems to fit this case exactly. We have been unable to find a single common law authority on this ques-

tion. Our law of bailments is admittedly borrowed from the civil law. The high authority of Addison on Contracts renders the adoption of the rule of the civil law in the text an authority in itself, in the absence again, of any authority to the contrary. To hold with the trial court would lead to disastrous results. An attaching creditor might take the subject matter of the bailment. An assignee could take it and the bailor perhaps be compelled to receive a small dividend out of his own money.

And finally, attention is called to the analogy between the conditional agreement for a loan in this case, and the cases of conditional sales, in which case it is held that the property does not pass until the performance of the condition. Chap. III, Benjamin on Sales.

A. R. English, (Wm. Herring, of counsel,) for Respondent.

PORTER, J.—Defendants were partners in the general grocery business. The defendant Fitzhenry, in the absence and without the knowledge of defendant Mansfield, received from the plaintiff $400 in gold coin, and at his request, and for his accommodation, put the money in the firm's safe for safekeeping. Mansfield knew nothing about the transaction until after the loss of the money. The plaintiff and Fitzhenry being together in defendants' store, in the absence of Mansfield, Fitzhenry told the plaintiff "that the defendants might be short of cash for freight, and asked him if they might use one hundred or one hundred and fifty dollars of the money if they needed it, to which the plaintiff replied that they might use the whole of it, provided he could have it by the first of the following month." The defendants' safe was afterwards robbed, and the plaintiff's money, among other things, lost.

The important question arises, did that conversation change the relation of bailor and bailee to that of creditor and debtor, without regard to whether the money was used or not? The true rule is as stated in 1 Add. Cont. 530, cited by counsel for plaintiff, and is as follows: "If a sum of money be bailed by one man to another under circumstances fairly leading to the presumption that the bailee has author-

ity from the bailor to use it or not, as he may think fit, the bilee will stand in the position of a mere depositary, or he will be clothed with the increased duties and liabilities of a borrower according, *as he may or may not have thought fit to avail himself of the privilege of user*, impliedly accorded to him. If he puts the money in a coffer or bags, and refrains from using it, and so preserves its identity, with the intention of restoring it *individuo* to the bailor, he undertakes the duty of a mere depositary, and is bound only to take the same care of the deposit that he is in the habit of bestowing on his own money, and will not be responsible for loss by robbery, fire, or any other casualty. But if he were to mix the sum deposited with his own money, with the intention of restoring an equivalent, and so destroy the identity and individuality of the subject-matter of the bailment, this would be a user of the money, which would at once alter the nature and character of the bailment, converting it into a loan for use and consumption, with its increased duties and responsibilities."

We cannot see that there was an absolute loan of the money created by the conversation between plaintiff and Fitzhenry. It was contingent upon the necessity for the use of the money. No consideration having passed, the plaintiff did not lose dominion over the money till its acceptance. Fitzhenry testifies that the contingency did not arise, and that the money remained in the safe as at first placed, till the robbery. We find a case directly in point, cited by counsel, in 60, Miss. 330, (reported in 45, Am. Rep. 410,) *Caldwell* v. *Hall*, in which the opinion was rendered by the eminent Judge Chalmers, which says: "Appellee Hall placed in the iron safe of appellant Caldwell the sum of thirty-five dollars. It was contained in an open box, and to it and from it Hall added and withdrew at his pleasure, so that at one time he had on deposit as much as seven hundred dollars. The money was never mingled with Caldwell's, nor was any receipt given for it, nor any entry of it made upon his books. His book-keeper, who carried the key of the safe, sometimes used small portions of it in making change, always dropping into the box tickets, showing the amount so withdrawn, and always replacing them within a

few days. His habit in this regard was known to and acquiesced in by both the depositor and depositary. Some months after the date of the original deposit, Caldwell's safe was robbed, without any fault or negligence on his part. His own money was lost along with that of Hall and other depositors. Caldwell was not a banker, but a merchant, and the deposits belonged to friends and customers to whom he had not made himself liable. The day before the robbery his book-keeper used fifteen dollars or twenty dollars of Hall's money, which not having been replaced, he paid to Hall after the robbery. This suit is brought by Hall to recover the balance of the sum stolen. The right to recover is rested upon the statement testified to by Hall, but denied by Caldwell, that at the time of the first deposit it was understood and agreed between the parties that the money was to be used by Caldwell in his business, if he so desired, and that it was received on this basis. It is not claimed that Caldwell actually then became the borrower of the money, and that the relation of creditor and debtor then arose but that Caldwell became a bailee for the money, with an agreement to return it in specie, or to use it and repay with other money at his option. * * * In order for this suit to be successfully maintained such a state of facts must be shown as will warrant the idea that Caldwell, when the money was deposited, became at once the debtor of the depositor; and testing the case by Hall's own testimony, it is evident that such was not the contemplation nor agreement of the parties. The true aspect of the case, under the facts testified to by him. The money was received by Caldwell as a bailee, without reward, and was to be so held and accounted for by him, with permission, however, to use it in his business, if at any time thereafter he should elect to do so. If he *did* use it, he was to become at once the debtor of the depositor. If he did *not*, but on the contrary it should continually remain on deposit at all times subject to be drawn out by the depositor whenever he chose, and without consultations with Caldwell, the latter remained a bailee without hire and bound only for that ordinary care demanded of persons occupying that position. It is not pretended by

appellee that appellant, at the time of the deposit, borrowed the money or in any way indicated a present intention to appropriate it to his own use; and the subsequent manner of dealing with it by both parties shows that it continued to be regarded by them both as the property of the depositor. Under this state of facts, there was no liability upon the depositary."

The defendants requested the court to charge the jury as follows: "The court instructs the jury that, although they may find from the evidence that the plaintiff, at the request of the defendant Fitzhenry, consented that the defendants might use a part of the money which he had deposited with them for safe-keeping, if they needed it, that alone would not constitute a loan, and that the plaintiff cannot recover on the third cause of action, unless you further find from the evidence that the defendants did in fact use the money." But the court refused so to charge, but charged the jury that if they "believed from the evidence that the defendant Fitzhenry requested the plaintiff to permit him to use the said money, or a part thereof, and the plaintiff consented that he might so do, and if they also believed that this transaction was one for the benefit of the firm, then the relation of bailor and bailee, which had heretofore existed between the parties, was changed to one of creditor and debtor, as to the amount which the plaintiff consented that the defendants might have use of, and the plaintiff would be entitled to a verdict on the third cause of action for that amount, whichever the jury might find it to be from the evidence, whether the money was in fact used or not." The refused instruction should have been given, and the one given should have been refused. Before the use of the money by defendants the contract was unexecuted and the title had not passed to defendants.

The judgment is reversed and the cause remanded.

[Civil Nos. 202, 203, 205. Filed September 5, 1887.]

[S. C. 15 Pac. 26.]

[The Tombstone Townsite Cases.]

JAMES REILLY, Plaintiff and Respondent, v. GEORGE G. BERRY, Defendant and Appellant. SAME v. BENONI BLACKMORE. THE MOUNTAIN MAID MINING CO. v. REILLY.

1. MINES AND MINING—LOCATION NOTICE—UNCERTAINTY—EVIDENCE—AIDER BY EXTRINSIC EVIDENCE—AMENDMENT WHERE OTHER RIGHTS HAVE INTERVENED DOES NOT RELATE BACK.—A location of a mining claim, to fix the title as against after acquired rights by entry and patent, should be sufficiently clear to designate the ground claimed, and should be marked on the ground by monuments, showing the extent of the possession. If the location on its face be uncertain, the uncertainty could be aided by evidence of the possession, or of monuments; but a location notice, on its face uncertain and without evidence of what land was occupied, cannot be evidence for any purpose. An amendment, afterwards made, describing different land, or making certain what was uncertain, cannot revert back to the original defective location.

2. PUBLIC LANDS—TOWNSITE ENTRY ON LAND NOT KNOWN TO BE MINERAL PRIOR TO AFTER ACQUIRED MINING CLAIM.—A town-site entry upon land not known to be mineral land at the time of entry is prior to any after acquired mining claim.

3. SAME—MINES AND MINING—TOWNSITE ENTRIES—MINING LOCATIONS—CONFLICTING CLAIMS.—All mines, mining claims, and possessions held under existing laws are excluded from the terms of a town site patent, and such as are located prior to the town site entry are paramount thereto. Lands known to be mineral lands at the time of the town site entry are not included in such town site entry.

4. MINES AND MINING—QUESTION AS TO LAND BEING MINERAL RES ADJUDICATA UPON ISSUANCE OF PATENT.—Whether lands are as a matter of fact mineral lands is *res adjudicata* by the patent to the mining claim.

5. PUBLIC LANDS—TOWNSITE ENTRIES—CANNOT ACQUIRE TITLE TO MINERAL LAND UNDER.—Title to known mineral land cannot be acquired under the town site laws.

RE-HEARING DENIED. JANUARY 9, 1888.

Dismissed, with costs, pursuant to the 10th rule, 145 U. S. 629-630-647; 36 Law Ed. 859.

APPEAL from a Judgment of the District Court of the First Judicial District in and for the County of Cochise. Affirmed.

The facts are stated in the opinion.

George G. Berry, for Appellants.

Thomas Mitchell and Goodrich & Smith, for Respondent.

BARNES, J.—The question presented in these cases is between a title derived from the Tombstone town-site patent, and one derived from a patent to the Mountain Maid Mining Company. The date of entry of the town-site is April 9, 1880. The mining patent was dated August 15, 1882. February 25, 1879, there was filed a notice of location of the Mountain Maid mine. This notice is so uncertain that the land claimed cannot be identified. It is aided by no evidence whatever. November 20, 1880, the record was amended, and on August 15, 1882, a patent was issued to the land described in the amendment. This amendment was after the entry of the town-site. The mining title cannot be superior to the town-site title, unless the location, earlier than the town-site, be held to have fixed the title. A location of a mining claim, to fix the title as against after acquired rights by entry and patent, should be sufficiently clear to designate the ground claimed, and should be marked on the ground by monuments, showing the extent of possession. If the location on its face be uncertain, the uncertainty could be aided by evidence of the possession, or of monuments; but a location notice, on its face uncertain and without evidence of what land was occupied, cannot be evidence for any purpose. An amendment afterwards made, describing different land or making certain what was uncertain, cannot revert back to the original defective location. The entry of the town-site intervening after the first location and before the amendment must be prior in right as it is prior in time. If this were not so, it would

open the door to great wrongs. A person might locate a mining claim, and then, by doing $100 worth of work annually, lie still and permit title to be acquired from a town-site, buildings erected, thousands of dollars spent, and then apply for a patent, amend his record, and swing his claim around, so as to include the most valuable improvements, and hold the same under his mining claim; and there is no limit to the time he might wait. It would be monstrous to give that construction to the mining act of 1872 and the town-site act as would make such a result possible. A town-site entry upon land not known to be mineral land at the time of entry is prior to any after acquired mining claim. *Deffeback* v. *Hawke,* 115 U. S. 392; 6 Sup. Ct. Rep. 95.

We have reviewed with care the *Butte City Smoke-House Lode Cases,* 6 Mont. 397, 12 Pac. 858, and *King* v. *Thomas,* 6 Mont. 409, 12 Pac. 865. We concur with these cases in holding that all mines, mining claims, and possessions held under existing laws are excluded from the terms of a town-site patent; that mining claims, located before the town-site entry, are paramount thereto. We also go so far as to say that lands upon which is any mine of gold, silver, cinnabar, or copper, or known to be such mineral lands, at the time of a town-site entry, are not included in such town-site entry. If those cases are to be construed as holding that if minerals be discovered in lands conveyed by a town-site patent, after the patent, and located as such, that such after-discovery and location become paramount to a town-site patent, and take such lands out from the operation of such patent, we do not concur with them. The question does not arise in the *Smoke-House Cases.* In the *King Case* there is some doubt as to whether this question is passed upon. The court in that case properly held that whether the lands were as a matter of fact mineral lands is *res adjudicata* by the patent to the mining claim. They held that the Silver King was a valid mining claim at the time of the issuing of the town-site patent. This view of these cases will meet with approbation, and clearly states the law as we understand it. The case before us, however, seeks to apply the principle to an invalid mining claim, prior to the town-site patent, and without proof that any mine existed prior to the town-site entry, or that the lands

were known to contain mineral veins or deposits, or that there was any possession under existing laws. This is a very different question. To hold that every purchaser of a lot under a town-site patent, who erects valuable improvements thereon, ever after rests upon the precarious chance of having his title and possession defeated by the discovery of minerals sufficient in amount to sustain a mining claim, is further than we can go. The supreme court in the *Deffeback Case, supra,* seems to have had this in mind, and to have recoiled from it, and they go no further than to hold "that a title to known mineral land cannot be acquired under the town-site laws."

We therefore hold that the Tombstone town-site patent is paramount to the patent to the Mountain Maid mine. The judgments are affirmed.

Wright, C. J., concurs.

[Civil No. 190. Filed September 26, 1887.]

[S. C. 15 Pac. 37.]

W. A. DALTON et al., Plaintiffs and Appellants, v. LORENZO RENTARIA et al., Defendants and Respondents.

1. IRRIGATION—ESTOPPEL BY CONDUCT.—Parties will not be permitted to stand by for sixteen years or more and see new fields brought into cultivation and improvements made under circumstances which showed that the persons making them believed they had an equal right to the use of water and then be heard to complain. Acquiescence, or non-action, for so long a time gives consent.

2. APPEAL AND ERROR—REVIEW OF EVIDENCE TO SUPPORT FINDING—NEW TRIAL—OBJECT OF MOTION FOR.—Where the evidence is sufficient to support the finding, or where the evidence is conflicting, although it may greatly preponderate against the finding, the appellate court will not, at law, interfere; where, however, in equity, the evidence is clearly insufficient, or where there is no evidence at all, it is otherwise. The object of a motion for a new trial is to enable the appellate court to look into the evidence to see if it be sufficient to support the finding.

3. ARMY AND NAVY—COURTS MARTIAL—JURISDICTION OVER CIVIL

RIGHTS—EVIDENCE—OFFICIAL MAP.—An official map, purporting to determine water privileges, made by order of a military governor, is not admissible in evidence. A military officer has no authority to exercise judicial functions, outside of military affairs, nor to authorize others, not otherwise capacitated, to determine the civil rights of a citizen. Martial law may enforce order, but has no jurisdiction over property rights.

4. APPEAL AND ERROR—OBJECTIONS TO PLEADINGS CANNOT FIRST BE RAISED IN APPELLATE COURT.—Criticisms will not be made, or objections raised, to a pleading for the first time in an appellate court.

5. IRRIGATION—ESTOPPEL IN PAIS, AND TITLE BY LIMITATION AND PRESCRIPTION SIMILAR.—With reference to the rights acquired in the use of water, estoppel in *pais*, and title by limitation and prescription, are very similar; and the latter two, to real estate, are practically synonymous.

6. TRIAL—FINDINGS UPON MATTER NOT IN ISSUE VOID.—A finding, both of law and of fact, made upon issue not raised by either complaint or answer error; it is *coram non judice*.

7. IRRIGATION—EVIDENCE AS TO PRIOR RIGHT DISTINGUISHED FROM EVIDENCE AS TO PRIOR USE.—The evidence shows that the defendants had the prior right yet the plaintiffs had the *use* of said waters. Most of defendants' testimony was as to *prior right* and not as to *prior use* of said water.

8. IRRIGATION—PRIOR RIGHT TO USE OF WATER BARRED BY ADVERSE USER—DISTRIBUTION OF WATER—CUSTOM.—Adverse user of water for three times the statutory period of limitations in this territory ripens into vested right to the use of water. Where the evidence in the case shows a custom in the distribution of water, and that custom was certain, definite, uniform, and notorious, and had been acquiesced in for more than 16 years, it has acquired sufficient age to give it the force and sanction of law.

APPEAL from a Judgment of the County Court in and for the County of Pima. Reversed.

The facts are stated in the opinion.

Earll, Campbell & Stephens, for Appellant.

The plaintiffs plead the statute of limitations. The court

fails to find upon that issue. This error is fatal. *Knight* v. *Roche,* 56 Cal. 15; *Baggs* v. *Smith,* 53 Cal. 88; *Baggs* v. *Smith,* 53 Cal. 300; *Baggs* v. *Smith,* 53 Cal. 435; *Baggs* v. *Smith,* 53 Cal. 687.

The defendants have slept on their rights for a period extending from 16 to 50 years. In the meantime the plaintiffs have reclaimed the desert, built their homes, and lived in peace and plenty. There is still water for all, and certainly equity will protect these plaintiffs.

Hereford and Lovell, for Respondents.

WRIGHT, C. J.—Plaintiffs brought this suit in the county court of Pima county, in March, 1885, to restrain the defendants from preventing the waters of the Santa Cruz river from flowing through certain *acequias,* whereby said waters were conducted upon plaintiff's land. After averring that said lands had been owned and cultivated by plaintiffs, or those under whom they claim, for a period of time ranging from 16 to 50 years, the complaint then, among other things, alleges "that during all the times herein mentioned said lands have been irrigated from the waters of the Santa Cruz river, from one main *acequia,* and distributed by others, which were kept in common repair for the use of all, below one and one-half miles above said Silver lake, in proportion to the lands respectively cultivated. That for more than sixteen years these plaintiffs, their grantors and lessors, have contributed their respective proportion of labor and expense in maintaining all of said *acequias,* for irrigating said lands, equally with defendants, and all others below said point. That said lands are agricultural, capable of raising valuable crops; but without irrigation no crops can be raised, and those now growing will perish, and plaintiffs lose the labor performed, seed sown, and expenses incurred attending the same. The defendants refuse to permit these plaintiffs to use any of the waters of the said Santa Cruz river to irrigate their respective lands. That said defendants, although requested to permit said water to flow through said *acequias* upon plaintiffs' lands, as plaintiffs were entitled to have them do, and as has been always heretofore permitted,

disregarding said right, since the said thirtieth day of March, 1885, have unlawfully prevented the use of said waters, and threaten to so continue to wholly deprive plaintiffs of the enjoyment thereof."

The answer denies and traverses the allegations of the complaint, except that it admits that lots 13 and 14 in section 10, and 23 and 24 in section 11, and the south 10 acres in section 11, had been occupied for 23 years; and the said answer further admits that the greater part of plaintiffs' lands as described in the complaint had been cultivated for 16 years. These admissions on the record are significant, and evoke a serious reflection. If the greater part of the plaintiffs' lands has been cultivated for the last 16 years, it was done with or without defendants' consent. If without their consent, have they not been guilty of laches, unreasonable delay, and inexcusable neglect in waiting 16 years without taking any steps to restrain the wrongful acts of plaintiffs? If the defendants were fairly put upon their guard; if they had actual knowledge that plaintiffs were diverting waters that belonged to defendants by virtue of prior appropriation; if they stood by for 16 years or more, and saw the plaintiffs build their houses, open out their lands, and put them in cultivation, expend their money in the improvement of these homes, pay their proportion of the expense, and bear their proportion of the labor in building and repairing the *acequais,* and otherwise do and perform such acts as indicated that plaintiffs believed they had equal rights with defendants to the waters of the Santa Cruz river, do not all these circumstances serve to imply that defendants waived or abandoned any exclusive prior right to said waters? At least, was there not such unreasonable delay as that they are now precluded from complaining? Will parties be permitted to stand by for 16 years or more, and see new fields put in cultivation, irrigated, forsooth, with water to which they have an exclusive prior right, see large sums expended in erecting new homes, and witness new and important interests intervene, and then be heard to complain? A *fortiori,* defendants will not be heard to complain if these things were done with their consent. Indeed, our opinion is, in this case, that acquiescence, non-action, on the part of

the defendants, for so long a time, *gave* consent. They could not consent "till right vested, and then *dissent.*" So that it is really immaterial whether the irrigation was done with or without defendants' consent, if they stood passively by. See *Smith* v. *Hamilton,* 20 Mich. 433, 4 Am. Rep. 398; *Parke* v. *Kilham,* 8 Cal. 78, 68 Am. Dec. 310; *Joyce* v. *Williams,* 26 Mich. 332.

In the case of *Niven* v. *Belknap,* 2 Johns, 573, Judge Thompson held that *silence* worked an estoppel. In delivering the opinion of the court he says: "Though it does not appear positively from the evidence that Belknap took any active agency in this negotiation, yet his *presence* and *silence* are equally efficacious and binding upon him, if the complainant was thereby misled and deceived. There is an *implied,* as well express, assent; as where a man who has a title an knows it, and either encourages or does not forbid the purchase, he and all claiming under him, shall be bound by such purchase." It is very justly and forcibly observed by a writer on this subject (Rob. Frauds, 130) that there is a negative fraud in imposing a false apprehension on another by silence, where silence is treacherously expressive. *In equity, therefore, where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent.*". And in the case of *Gregg* v. *Von Phul,* 1 Wall. 274, the learned judge used this language: "No one is permitted to keep silent when he should speak, and thereby mislead another to his injury."

In the case at bar, the defendants allowed the plaintiffs, or those under whom they claim, to open out their fields, and irrigate them with water of the Santa Cruz river, as though they had a vested right therein; to vote for and participate in the election of water overseers or commissioners; to pay their proportion of the assessment for water development, etc.; to pay their part of the expenses, and do their part of the labor, in cleaning and repairing the *acequias;* to expend large sums of money in payment for their lands, putting them in cultivation, and building their homes, —and all this, too, for a period of 16 *years* or more. Can the defendants now exclude the plaintiffs from a participation

in the use of these waters? We are of the opinion that they cannot. See *Dickerson* v. *Colgrove,* 100 U. S. 578; *Kirk* v. *Hamilton,* 102 U. S. 68, and authorities there cited. Judge Harlan, in this case, quotes from *King* v. *Inhabitants of Butterton,* 6 Term R. 554, in which Justice Lawrence said: "I remember a case some years ago in which Lord Mansfield would not suffer a man to recover in ejectment where he had stood by and seen the defendant build on his land." This doctrine of equitable estoppel *in pais* will apply to cases even in courts of law.

It might be observed that, in this case, it is true there were occasionally disputes about who had the prior right to the use of the water. Indeed, from the defendants' testimony, especially that of Mr. Oury, these individual disputes had occurred prior to 1862, a period anterior to the time, as alleged in defendants' answer, when the plaintiffs first cultivated their lands; so that some of these disputes must have occurred between occupants of the "Old Fields" alone, while some of them may have occurred between occupants of the "New Fields" alone. But the testimony all shows, from first to last, that the plaintiffs always claimed an equal right to the *use* of said waters. The testimony, we think, also shows that plaintiffs also equally *enjoyed* the *use* of said waters, and there seems to have been a pretty general acquiescence in the plaintiff's said use until the year 1885, when by some means, which are not apparent from the evidence, Carrillo, Hughes, and Davis became the acting water commissioners, by whose authority perhaps, whether legitimate or, not, Rentaria, the acting water judge or overseer, prevented the flow of said waters through said *acequias* upon plaintiffs' land; and this suit is therefore the first distinct contest between the cultivators of the "Old" and "New Fields," involving their respective rights to the use of the waters of the Santa Cruz river.

Again, the admissions in defendants' answer raise another important question. All the evidence shows—in fact, it would go without saying—that the lands in the valley of the Santa Cruz river, both the "Old and New Fields," are absolutely worthless for agricultural purposes without the waters from said river. Now, if the greater portion of

plaintiffs' land has been in cultivation for 16 years or more, it must inevitably have been irrigated with waters from the Santa Cruz river; and taking the averment in defendants' answer as true, that plaintiffs only had the use of the *surplus* water, is not the conclusion inevitable that there is, ordinarily, enough water in said river to irrigate, with the necessary, reasonable, and economical use of the water, all the lands in said valley, both old and new? If the plaintiffs got the benefit of the *surplus* water only, there must have been quite a quantity of it,—enough to fructify their crops; for certainly they would not have remained there for 16 years with their families, and starved. It seems to us the admissions in the defendants' answer are inconsistent with the theory that plaintiffs had only the use of the *surplus* water. The evidence of plaintiffs shows that they used the water of the Santa Cruz river just the same as the defendants; while defendants' evidence, although claiming rights prior to plaintiffs' to the use of the water, and that plaintiffs had only the right to use the *surplus* water, yet it is not seriously denied that plaintiffs actually *did use* the said waters, as claimed in the complaint.

Now, we are well aware of the well-settled rule that where the evidence is sufficient to support the finding, or where the evidence is conflicting, although it may greatly preponderate against the said finding, the appellate court will not, at law, interfere; where, however, in equity, the evidence is clearly insufficient, or where there is no evidence at all, it is otherwise. Besides, the object of a motion for a new trial is to enable the appellate court to look into the evidence to see if it be sufficient to support the finding; and in looking into the evidence here we have not been able to escape the conclusion that the court below erred in its finding that plaintiffs sued, without objection, only *surplus* water, after the "Old Fields" had been irrigated. True, there was abundance of evidence that they only had had the right to *use* such *surplus* water; but if they used water other than *surplus*, even without right, for 16 years, without absolute hinderance by the defendants, can the defendants now complain? We think not. "If the owner of an estate stand by and see another expend money on an ad-

joining estate, the latter relying upon an existing right of easement in the other estate, without which such expenditure would be useless, *and do not interfere to prevent the work,* he will not be permitted to interrupt the enjoyment of such easement." See Bigelow, Estop. 512. This is almost exactly the case at bar; defendants certainly stood by and saw plaintiffs opening out their fields; they must have known, too, that plaintiffs would not be guilty of the extreme folly of going to such trouble and expense without expecting the use of the waters of the Santa Cruz river; this being the sole and solitary resource.

In a word, our view of this case brings it clearly within the rule of what is known as "estoppel by contract." Defendants may have had the prior right, but they lost it by their own conduct. They could have spoken, and were silent; they could have acted, and were passive. Counsel for defendants offered in evidence a map made by order of one Major Ferguson, in 1862, when martial law had been declared in Tucson, to show, as counsel stated, the boundary lines, *i. e.*, the lines beyond which the settlers of the "New Fields," in the use of water, could not go, as *per* determination of commissioners appointed, not by the people, but by the said Ferguson, under those martial-law proceedings. The plaintiffs, by counsel, objected to the admission of said map. The court, however, overruled the objection, and admitted the same. We think this was error. What jurisdiction or authority a military officer had to exercise judicial functions, (outside of military affairs,) or to authorize others to do so, and to adjudicate upon and settle the rights of citizens to the use of this water, and to order an official map made, circumscribing the limits of these water privileges, is more than we have been able to ascertain. Major Ferguson had been appointed military governor of Tucson by Gen. Carleton. The latter had no authority to confer, and he did not confer, judicial authority upon his subordinate to sit in judgment upon and determine the *civil* rights of a citizen, or to authorize others, not otherwise capacitated, so to do. There was no military necessity that these martial-law proceedings should be had, and this map be made, divesting and vesting the civil rights of the citizen.

Martial law may enforce order, but has no jurisdiction over property rights. We do not find such authority in the Constitution, nor do we find it in the laws. Congress has never gone so far as to authorize the confiscation, by the military, of real estate in this country. Sorry the day, when the title to real property in this republic shall hang upon the whim of a military officer. If these proceedings, under this military governor and the reign of martial law, amounted to anything, they were a quasi confiscation of the property rights which one class of citizens may have had in said waters, and vested them in another class.

These proceedings, according to the answer, were all had prior to the settlement of the "New Fields." Defendants are bound by that answer. Therefore we are unable to see any relevancy this map has in this case, or on what ground it could be competent to establish the fact for which it was offered.

Those proceedings, evidently had no binding force, beyond the temporary ascendency of the military. Surely they could not effect the permanent civil rights of the citizen. Where the mailed hand was lifted, the elastic rights sprang back to their normal condition.

The absorption by the military of civil rights is a dangerous encroachment and has never been justified in this country except upon the tyrants plea of military necessity.'

Again, we think the defendants are barred by the statute of limitations of this territory, and by prescription, and that the court below erred in not so finding. True, the complaint may have been obnoxious to criticism in this respect: the statute could have been pleaded more specifically; but the complaint avers "that each of which said tracts of land has been owned, possessed, occupied, and cultivated continually by plaintiffs or their predecessors in title for a period of not less *than sixteen years;*" and "that during all the times herein mentioned the said tracts of land have been irrigated by the waters of the Santa Cruz river, taken from said river by one main *acequia,* and distributed by several other *acequias,* which were constructed and kept in repair in common, and for the common use of all the people." No objection was raised in the trial below

to this pleading. The answer of defendants specially denied each of these averments, except as to the time said lands had been cultivated; and the evidence largely concerned the length of time of plaintiffs' user; so that this issue was undoubtedly joined, and was the important question in this litigation. Criticisms will not be made, or objections raised, to a pleading for the first time in an appellate court. See *Crans* v. *Hunter*, 28 N. Y. 395; *White* v. *Railroad Co.*, 50 Cal. 417; *Hutchings* v. *Castle*, 48 Cal. 155; *King* v. *Davis*, 34 Cal. 100. With reference to the rights acquired in the use of water, estoppel *in pais*, and title by limitation and prescription, are very similar; and reasoning upon one will inevitably enfringe upon that of the others, especially in a case like this. Indeed, title by limitation, and title by prescription, to real estate, are practically synonymous.

This issue was raised, then, and the court below failed to make a finding either of law or fact upon it; which we think was manifest error. But the court did make a finding, both of law and fact, upon an issue that was certainly not raised by either complaint or answer; viz.: "That the occupants of said gardens, [Chinese gardens,] which have had the continual use and enjoyment of said water for the irrigation thereof for more than five years continuously next before the commencement of this action, and claiming said right adversely to all others, are entitled to the continued use of so much water, upon Saturdays and Sundays, as may be necessary for the proper irrigation thereof." The court then proceeds to find that much of this Chinese garden land has been so occupied for from 6 to 15 years; and then proceeds to decide, in its opinion, that the defendants have acquired the right to the additional water necessary to irrigate these Chinese gardens, comprising, probably, 150 acres, by adverse user and prescription. There was no such issue in the case as this; the defendants did not raise it in their answer; and even the evidence that crept into the case on this point certainly was insufficient to justify the finding and decision. Neither side had invoked judicial acting on this question. We are of opinion, therefore, that this much of the finding and decision, both of law and fact, of

the learned judge below was error; it was *coram non judice.* These Chinese gardens, and the speculative inclinations of the owners, may have been the source of much trouble between the parties herein; and yet neither the pleadings nor evidence disclose it; the information is obtainable only in said finding and opinion.

The evidence shows that plaintiffs have always claimed an equal right to the use of the waters of the Santa Cruz river; and while, as we have already observed, the evidence also shows that defendants had the prior right, yet the plaintiffs, and those under whom they claimed, not only claimed an equal right, but they had *the use* of said waters without prevention by defendants until just before the commencement of this suit. Most of the defendants' testimony, aside from a mass of testimony as to damages, was as to the *prior right,* and not as to the *prior use,* of said water. Galiardo, an old gentleman, 72 years old, testified that at one time he had owned most of the "Old Fields" above. At that time water was common, and he told the settlers of the "New Fields" that he would not stop them; that the government protected agriculture; that they were children of the town and his neighbors. Juan Elias, another old citizen, testified that "the people below [the cultivators of the new fields] often won the fight, and elected the water overseers. The had equal shares of water." And Squire Charles H. Myers, the justice of the peace before whom these individual disputes about water came, says, in his testimony for the defendants, that he had before him probably a dozen of these disputes. Says he: "Whenever there was a quarrel about the water, there is a custom to appoint a commission, and they would go out and see whose grain needed the water the most. After they had seen the fields, they would come in and report, and say such and such a man's field, if it does not get it, [water,] will be lost; and that the field above could do without water till that got through. And, although they had no *right* to it below, under that system it was distributed to them; and it was understood among the Mexicans, and they always knew it was so, as long as they farmed here. And if the upper fields were suffering, and the lower fields were suffering,

the lower fields would have to suffer, because the new fields were entitled to the water last." It is to be observed that there is not one word in this important witness' testimony about *surplus* water.

Mr. Rentaria, one of the principal defendants, in his testimony says: "They [the water committee, Hughes, Carrillo, and Davis; just where their authority comes from does not clearly appear,] told me not to let the water pass down there [on the new fields]*if they did not pay for it.* I told them that Mr. Maish [up at the mill] had all the water stopped. They [the committee] told me: 'If you can't take care of the fields down there, take care of the fields up here.'" The witness, who had been water judge for 12 years, was asked this question: "Before that time, [March, 1885,]*have you given the people below the lane water the same as you have those above* the lane? *Answer. Other years I had;* but Mr. Dalton and others were the first to buy tickets, and Mr. Leon and Pacheco had bought tickets, and I gave them the water. *Q.* What time did Maish shut off the water? *A.* About the fifteenth of March; he let it overflow. He got some men and raised the embankment higher around the pond. After he fixed his dam, he kept the water back for twelve days, then there was a little amount of water." He afterwards corrects the time, and makes it from the first to the fifteenth of April.

Another fact of some significance, tending to corroborate the testimony of the plaintiffs, is that, as soon as the "New Fields" began to be settled, the "old common fence" was allowed to disappear. F. S. Leon, who, in 1862, under the martial-law proceedings, (which defendants had invoked for some reason in their case,) was appointed, not by the people, but by said Ferguson, the military governor of Tucson, one of the water commissioners, assumed to settle the rights of the disputants. When this witness was asked why that "old common fence" was allowed to disappear after the "New Fields" began to be settled, his answer was, "I don't know." The fact remains, however, that it did disappear about the time the "New Fields" began to be settled up and cultivated.

The evidence of these witnesses, (the most important and

impartial for the defendants, perhaps,) together with plaintiffs' witnesses, and the other facts and circumstances of the case, undoubtedly show that, until a lated date, there had been a general *sufferance* of an equal and equitable distribution of said waters; regard being had to those fields needing the water the most.

Beyond question, the settlers of the "Old Fields," most of them, had a prior right to these waters; but for 16 years or more they did not enforce it. Can they do it now? Are they not barred? Plaintiffs' adverse user of these waters for a time three times greater than the period of statutory limitations in this territory, has, we think, ripened into vested right to the equal use of the waters of the Santa Cruz river, with the cultivators of the "Old Fields," proportional to the number of acres in cultivation, and regard being had to the fields needing the water the most. See *Water Co.* v. *Richardson*, 72 Cal. 598, 14 Pac. 379.

We entertain the belief, from the evidence in this case, that there was a custom among these people in the distribution of this water; that that custom was certain, definite, uniform, and notorious; that it had in it the elements of equity and good conscience, of neighborly kindness and good will, and that under it cultivators of the "Old Fields," while claiming the prior right to the use of said water, and the cultivators of the "New Fields," while claiming an equal right to the use thereof, had settled their wrangles and disputes, and had lived together as neighbors and friends for more than 16 years, and had ultimately acquiesced in an equitable and equal distribution of said water, giving it first to those fields that needed it the most; and this custom, we think, has acquired sufficient age to give it the force and sanction of law.

There is something to be deplored in the spirit of that neighbor, who would take the crust from his neighbor's lips. These people should live together as neighbors, sharing each others misfortunes and rejoicing in each others blessings, in our conscience from the testimony we believe there is sufficient water in the Santa Cruz river, if only a necessary, economical and reasonable use thereof is had, to irrigate all these lands. There can be no doubt of the para-

mount importance of this water question. In a country where water is so scarce and so precious as it is in this Territory, it is of the utmost importance that its distribution and use should be as extensive as vested rights and material interests will admit. It is the policy of the law to encourage the building of new homes, the opening out of new farms. Thep rosperity of the Territory depends largely upon this policy; while motives of patriotism and good citizenship prompt to its hearty support.

Judgment reversed, and cause remanded to First judicial district court in and for Pima county, with directions to enter judgment for plaintiffs, making perpetual the injunction.

Wright, C. J., Barnes and Porter, JJ., concur.

[Civil No. 191. Filed September 26, 1887.]

[S. C. 15 Pac. 28.]

JOHN O'DOHERTY, Plaintiff and Appellant, v. LOUISA M. TOOLE, Defendant and Respondent.

1. FRAUDULENT CONVEYANCES—FROM HUSBAND TO WIFE—CREDITORS MAY SUBJECT PPOPXRTY IN WIFE'S HANDS TO CLARMS.—A conveyance of real estate by a husband to wife, in consideration of love and affection, is fraudulent as to creditors where the deed is unrecorded and the property is openly dealt with by the husband as his own, is assessed to him and he has paid the taxes thereon, and creditors may pursue such property into the wife's hands.

2. LIMITATION OF ACTIONS—CLAIMS AGAINST ESTATES—COMP. LAWS ARIZ. 1877, p. 274, par. 1647, CONSTRUED—CONSTRUCTION OF STATUTES OF LIMITATIONS.—Failure to present a judgment claim against a decedent within the ten months allowed by the statute, *supra*, forever bars it as a claim against the estate proper. In the construction of statutes of limitation appertaining to various subjects reference should always be had to the object designed to be accomplished in fixing each period of limitation. It does not bar an action to subject property to judgment which was and is a specific lien upon property fraudulently conveyed by decedent to his wife, such conveyance being good as between the parties and divesting the estate of title.

3. FRAUDULENT CONVEYANCES—EXECUTORS AND ADMINISTRATORS—NOT NECESSARY PARTY TO SUIT TO SUBJECT PROPERTY FRAUDULENTLY CONVEYED BY INTESTATE—COMP. LAWS ARIZ. 1877, p. 290, par. 1719-1720, CONSTRUED.—An executor is not a necessary party to a suit to subject property, fraudulently conveyed by his testator, to the payment of a debt of a judgment creditor. Statute, *supra*, construed.

BARNES, J., concurring specially, construes Comp. Laws Ariz. 1877, p. 274, par. 1647.

APPEAL from a Judgment of the County Court in and for the County of Pima. Reversed.

The facts are stated in the opinion.

J. A. Anderson, for Appellant.

Hereford and Lovell, for Respondent.

Appellant brought this action for the purpose of setting aside the deed of James H. Toole to respondent, upon the ground that said deed was fraudulent, and to subject the property conveyed to the satisfaction of his judgment against the firm of Hudson & Co., of which James H. Toole was a member. The court below did not find as a *fact* any fraudulent intent on the part of Toole in making the deed of gift, and it is not pretended that there was any fraud on the part of the respondent. Fraudulent intent is a question of fact, and not of law. Sec. 23, Chap. 37, Com. Laws of Arizona. Fraud must have been *intended* at the time of the conveyance. *Mattingly* v. *Nye*, 8 Wall. 370. Neither fraud or fraudulent intent was found as a fact by the court. It is the intent which renders a conveyance void for fraud as against creditors. Bump on Fraudulent Conveyances, 3rd. Ed. p. 269.

The general rule is that a conveyance by a husband solvent at the time to his wife, will be supported, if he retain ample property to pay his debts, and the gift or conveyance was a reasonable one. Wait on Fraudulent Conveyances, par. 99, p. 308, and par. 208, p. 292; *Wallace* v. *Pen-*

field, 106 U. S. 260, 1 Sup. Ct. Rep. 216; *Graham* v. *R. R. Co.,* 102 U. S. 148.

In the absence of evidence that the husband was indebted at the time there is no presumption of invalidity. *Kane* v. *Desmond,* 63 Cal. 464; *Hussey* v. *Castle,* 41 Cal. 239. Subsequent creditors cannot question the conveyance. Wait on Fraud. Con. par. 208, p. 292. *Graham* v. *R. R. Co., supra.* Fraud must have been intended at the time. *Mattingly* v. *Nye, supra; Dunlap* v. *Hawkins,* 59 N. Y. 342, James H. Toole was worth from $50,000 to $75,000 in his own right, about $32,000 of which was in real estate in Pima County, Arizona, and he owed little or nothing at the time he made the gift to his wife. Under the laws of this territory the respondent in case of the death of Mr. Toole, would have inherited no part of his property. Sec. 1, Chap. 26, Comp. Laws. The gift was therefore a reasonable one. *Baker* v. *Koneman,* 13 Cal. 9.

The case of *Bittinger* v. *Kasten* was decided by the Supreme Court of Illinois in Sept., 1885, and reported in 19 Reporter 299. We call the attention of the Court specially to this case, and the authorities there cited.

Some point was made in the court below, upon the fact that the deed from Mr. Toole to his wife was not recorded until after the assignment to Stiles. But the appellant does not claim under the Assignee. The common law in force when this deed was made. Sec. 7, Chap. 61, Comp. Laws of Ariz. Nor was there any law in this territory requiring the deed to be recorded. Sec. 26, Chap. 42, Comp. Laws. is to the effect that if the deed is not recorded, "it shall be void as against any subsequent purhaser, in good faith and for a valuable consideration." No other penalty attached. "Judgment creditors are not "purchasers" within the meaning of the recording acts and unless put upon the same footing they do not obtain a benefit which a subsequent purchaser does by a prior record." 2 Pomeroy Equity Jurisprudence, par. 721, p. 177. An unrecorded deed is good as against a subsequent attaching creditor. "The Register Act does not make an unrecorded deed void as against subsequent attaching creditors." *Wilcoxon* et al. v. *Miller* et al., 45 Cal. 193. *Schroeder* v. *Guernsey,* 73 N. Y. 430.

The appellant neglected to present his judgment to the executor of Toole, for allowance. The court below held he was barred by reason of such failure. Secs. 202 and 203, Chap. 29, Comp. Laws.

Counsel for appellant contends that these sections, giving the executor or administrator the right of action to recover property fraudulently conveyed by a decedent, for the benefit of creditors, is merely cumulative, and concurrent with the right of the judgment creditor to maintain the action, and cites Wait on Fraud. Con. Sec. 112, p. 175, and Sec. 113, p. 127. We contend that these citations show that the contrary is the rule.

It rested with the plaintiff to show fraud and fraudulent intent. Wait on Fraud. Conv., par. 273. A mere suspicion of fraud is not sufficient to defeat a conveyance. Idem. par. 383.

Appellant neglected to present his judgment to the executor and have it allowed as a claim against the estate of Toole, and to request the executor to institute a suit to recover the property alleged to have been fraudulently conveyed; his judgment is therefore barred forever, and he cannot therefore maintain this suit against the respondent. Sec. 202, chap. 29, Comp. Laws; *Board of Pub. Works,* v. *Columbia College,* 17 Wall. 521; *Hill* v. *Sherwood,* 48 Cal. 386; *Bate* v. *Graham* et al., 11 N. Y. 237.

WRIGHT, C. J.—The main questions raised by the record in this case are: (1) Had the appellant and creditor, under the general law, the right to pursue the property fraudulently conveyed by the debtor, in the hands of the vendee, without joining the executor of the deceased debtor? (2) If so, has the law of this territory contravened that right, or by it is the debt barred and the right lost, because the claim was not presented for allowance in the probate court within the 10 months allowed by said law?

John O'Doherty, the appellant and creditor, had recovered judgment against James H. Toole, the husband of respondent, Louisa M. Toole, and one Hudson, during the life-time of said Toole, in the district court of Pima county, for about $3,800. The exact date of the judgment was May 29, 1884; the appel-

lant having been a creditor of the said Toole some months prior to the date of the judgment. On the first day of November, 1882, Toole executed a deed to the respondent, his wife, whereby he deeded to her certain premises in the city of Tucson, worth at the time probably $15,000. This was a voluntary conveyance, made in consideration of one dollar and love and affection; and the judge below, in his first conclusion of law, finds that the deed was fraudulent and void as to appellant, but that it vested a good title in respondent, as to said Toole, his heirs, devisees, and assigns; and, in his second conclusion of law, he finds that respondent was and is estopped from denying that said deed was and is void as to the creditors of the said Toole.

These findings or conclusions of law were undoubtedly correct. The evidence showed that, after Toole had executed this deed to his wife, the respondent, she and he suffered it to lie in a drawer, along with other papers of his, for nearly two years; that it was not recorded until two months after the assignment, in May, 1884; that during all that time the public, including appellant, had no intimation whatever that the property had been deeded by Toole to his wife; that, on the contrary, Toole gave the property in to the assessor as his, during the years 1883 and 1884, and paid the taxes thereon during those years; that he continued to act towards the property in every respect as though it was his, thereby in a measure superinducing the deposits, by appellant and others, in the bank of Hudson & Co., and the consequent loss of their money. In a word, here was a case of actual fraud, and the court below so found. Now, the appellant was a judgment creditor of the said Toole; and his judgment having been regularly docketed, was and is a lien upon the property so conveyed by Toole to his wife, the respondent here; and while said property, by virtue of said conveyance, ceased to be a part of Toole's estate, the deed being good between the parties thereto, it was and still is subject to the lien of appellant's judgment. While, as the learned judge below observed, it was fraudulent and void as to creditors, it was good as to Toole and his heirs and assigns. Appellant's judgment, it was true, was a valid and subsisting claim also against the said Toole's estate; and, until the expiration of the 10 months

allowed by statute for presenting claims, it might have been presented and allowed against said estate; but, because it was not thus presented and allowed, and is therefore forever barred as a claim against said estate, has the appellant lost his remedy against the property so fraudulently conveyed to respondent as aforesaid? Clearly not, we think. Indeed, we believe no doctrine of equity is more generally and explicitly settled in this country by general law than that creditors may pursue property fraudulently conveyed into the hands of the vendee. This doctrine has come down from the old statute of 13 Eliz. An examination of the cases will show that the law has been settled, almost uniformly, in accordance with the spirit of that statute in all the states; and, while confined largely to the domain of chancery courts, its principles have generally obtained in courts of law; the main difference being that in the latter fraud must be proved, while in the former it is often presumed; in the one the chancellor stands upon the broad plains of conscience; in the other the judge may not go beyond certain stern and inflexible rules. It is the province of a court of conscience to tolerate no unclean thing. Honesty and fair dealing are the vitalizing currents of its healthy existence. He who would have others be honest, must be careful that he himself is not dishonest. Here no man is to be allowed to profit by his own wrong. He cannot rightfully ask that others keep their houses in order till he has dusted his own floors. As was said by Judge Bliss of the supreme court of Missouri, in *McLaran* v. *Mead*, 48 Mo. 115: "The husband will not be permitted to hold property in the name of his wife, or withdraw it from the reach of his creditors, and *give* it to her, so as to shield it from execution." In that case reference is made to the strong case of *Gault* v. *Saffin*, 44 Pa. St. 307, where Judge Read holds that a husband cannot fraudulently cover up his property through the agency of his wife; but that the same, when thus covered up, may be discovered by the creditors of the husband. To pursue property fraudulently conveyed by a testator in his life-time, it is not necessary to have the deed first set aside. The judgment creditor may go into a court of equity, and have a decree ordering the sale of the property to satisfy his debt. And where there is a

voluntary conveyance by a husband to his wife of real estate, and such conveyance is not recorded, although the husband is insolvent; and the husband continues to act towards the property as though it were still his own, and thereby deceives his creditors to their injury,—a court of equity will set aside said conveyance as void, or grant other proper relief, at the instance of the creditors. See *Fellows* v. *Smith*, 40 Mich. 689; *Lee* v. *Figg*, 37 Cal. 328, 99 Am. Dec. 271; *Lander* v. *Beers*, 48 Cal. 546; *Robinson's Ex'r* v. *Robards*, 15 Mo. 459; *King* v. *Moon*, 42 Mo. 551.

Thus far, then, the court below was right in its findings that said deed from Toole to his wife was fraudulent and void as to the former's creditors, and that the latter was estopped from denying that such was the case. We entertain no doubt, however, that the court was in error in deciding that the judgment creditor, the appellant here, having failed to present his judgment as a claim against Toole's estate in the probate court of Pima county, within the 10 months allowed by the statutes of the territory, could not maintain this action because his claim was thereby forever barred as a claim against said estate. The *nisi prius* judge had already found as a fact, as alleged in the complaint, that the estate of Toole was wholly insolvent. No beneficial purpose, therefore, would have been subserved by presenting appellant's judgment claim against it; the real estate conveyed by Toole to his wife, as we have already observed, having ceased to be a part of his estate. We repeat, it is true that the appellant, having failed to present his judgment claim against Toole's estate within the 10 months allowed by statute, *it became thereby forever barred as a claim against said estate;* that is, the appellant lost his remedy to collect his debt against the estate proper. In construing statutes of limitation appertaining to various subjects, and found in different parts of the general body of laws, reference should always be had to the object designed to be accomplished in fixing each period of limitation. This period of limitation for presenting claims against an estate is brief,—purposely made so by the legislature. The object of administration is to pay off the debts and wind up the estate of the deceased, that the heir may not be long delayed in coming to his inheritance.

But would it not be unreasonable, and even unjust, to infer that, because forsooth the law-making department of the government had provided for the speedy transmission of estates from ancestors to descendants, it thereby became, in effect, the coadjutor of fraud, by contravening the well-established rules of equity, and by enabling a fraudulent dead man, through his representatives, to do what a dishonest live one could not do?

Clearly so; unless, possibly, the estate would suffer injury or the heirs incur loss, neither of which events could happen; for we have seen that the conveyance, though fraudulent, was good between the parties, and the property, by virtue thereof, ceased to be a part of Toole's estate; and his heirs, devisees, and assigns, being privy with him, are bound by his conveyance. Toole, if living, could not question the lien of appellant's judgment upon the property which he had fraudulently conveyed. Ought his representatives to be allowed to do so? True, as we say, by his fraudulent deed, Toole and his legal representatives were and are absolutely concluded, and the property it conveyed has become foreign to his estate; but it is also equally as true that appellant's judgment was and is a specific lien upon that property in the hands of respondent. Hence it is difficult to see how the court below arrived at the conclusion that, because appellant had failed to present his judgment claim against Toole's estate within the statutory period, this action which seeks to subject that property to the payment of his debt could not be maintained.

The learned counsel for the respondent contends that the court below did not find, as a *fact*, that the deed from Toole to his wife was made with *intent* to defraud creditors. The record does not bear out this claim. In the seventh finding of fact by the court below this language is used: "Said deed was made to provide against the hazards and contingencies of the banking business, and *for the purpose of hindering* and *delaying* the creditors of Hudson & Co." Toole himself was the "Co." We are entirely satisfied that the conduct of Toole and his grantee, the respondent here, contemporaneously with and after the execution of this deed, was such as fully warranted the judge below in finding *actual* fraud;

such as rendered it null and void both as to existing and subsequent creditors.

Counsel relies upon the late case of *Bittinger* v. *Kasten,* (Ill.) 19 Reporter, 299. But that is by no means a parallel case. There the complaint did not allege insolvency on the part of Kasten, nor that he was indebted, beyond the plaintiff's claim, at the time of making the deed to his wife; neither did the court find that his subsequent conduct was fraudulent, nor that the conveyance was made to provide against any financial hazard, or was not recorded; but it was admitted that the property was conveyed by the defendant to his wife as a reasonable provision for her. The court below and the appellate court seemed to have been satisfied of the good faith of the parties, and that the defendant, by having the property deeded to his wife, did not *intend* to delay or defraud his creditors. In other words, there was no *actual fraud.*

But the learned counsel for respondent contends that the executor of Toole's estate should have been requested and that he was the proper party to have brought the suit to have the fraudulent deed of his testator set aside, and the property revested in the estate as assets. Comp. Laws 1877, *c.* 29, §§ 202, 203, do give the executor or administrator the *right,* when the assets are not sufficient to pay the debts of the estate, to bring suit to set aside a fraudulent conveyance of the testator or intestate; and this for the sole purpose of paying the creditors' claims; but it does not say, and it surely does not mean, that the executor or administrator is the *only* party that has that right. Instead of being restrictive, was not this statute designed to aid the creditor, by conferring upon the executor or administrator of the fraudulent grantor the right to bring suit to set aside the fraudulent deed of such grantor, that the property thereby conveyed might be subjected to the payment of the creditor's debt? And does it not apply more particularly to *general creditors,* rather than to those creditors having *specific liens?* Did the conferring of a cumulative legal remedy, without words of divestiture, ever take away an equitable right? Because the statute says the executor *may,* does it mean that the judgment cred-

itor himself shall not pursue the property fraudulently conveyed?

The territorial law confers this additional statutory right; but it does not take away the well-established equitable remedy. The legislature simply made that statutory which was already within the clearly defined rules of equity; but it certainly did not mean that, to that extent, there should be no equitable remedy in the creditor. The utmost construction of which we think this statute would admit would be that the remedy is cumulative and concurrent with that of the general creditor. The administrator, in those states where the right is by statute conferred upon him, is certainly not a *necessary* party to a suit to subject property, fraudulently conveyed by his intestate, to the payment of the debt of a judgment creditor. See *Merry* v. *Fremon,* 44 Mo. 518; *Zoll* v. *Soper,* 75 Mo. 460; *Hagan* v. *Walker,* 20 Curt. Dec. 17; *Morris* v. *Morris,* 5 Mich. 180; *Hills* v. *Sherwood,* 48 Cal. 393. The horn-books clearly support this view. Mr. Wait, in his admirable work on Fraudulent Conveyances, at page 177, § 113, uses this language: "The legislation, clothing personal representatives with the power to appeal to the court to annul covenous alienations made by the deceased, is highly salutary in practice. The *concurrent* right of the creditor to seek redress is also of the utmost importance; for the personal representative is usually selected by, or is a near relative of, the deceased, and may in some cases be prompted by motives of friendship or self-interest to shield the parties who have depleted the estate, and in some instances is himself the fraudulent alienee." See, also, page 175, § 112. Also, Bump. Fraud. Conv. (3d Ed.) 548.

It is ordered that the judgment of the county court be reversed, and the cause remanded to the district court of Pima county, with directions to enter up judgment in favor of appellant, and against respondent, declaring said deed by James H. Toole to his wife, the respondent here, fraudulent and void as to creditors, including appellant, and ordering the property conveyed by said deed to be sold by the sheriff of said county, and the proceeds, after payment of costs of sale, devoted to the payment of appellant's debt; and for interest and costs of both suits. If there should be a

surplus remaining over, it should be paid over to Mrs. Toole, the respondent; who will hold it, however, subject to the claims of other creditors of her husband, James H. Toole, should there be any.

BARNES, J.—By the probate act it is provided that, "if a claim be not presented within 10 months after the first publication of the notice, it shall be forever barred." Comp. Laws, 1647. This provision is borrowed from the statutes of California, where it has received judicial construction. In *Fallon* v. *Butler,* 21 Cal. 24, 81 Am. Dec. 140, it was held that a mortgage upon real estate may be foreclosed by action against the administrator, although the debt has not been presented as a claim against the estate and allowed, where the only object is to reach the property mortgaged, and no judgment is asked against the estate. In that case the court holds that the term "claims" in the probate court act "only has reference to such debts or demands as might have been enforced against him [intestate] by personal action for the recovery of money, and upon which only a money judgment could have been rendered." "In this sense a mortgage lien is not a claim against the estate." This case is approved in *Pechaud* v. *Rinquet,* 21 Cal. 76; *Willis* v. *Farley,* 24 Cal. 498; *Orr's Estate,* 29 Cal. 104, and *Brown* v. *Orr,* 29 Cal. 122. However, in *Ellis* v. *Polhemus,* 27 Cal. 350, the court held the word "claim" to be broad enough to embrace a mortgage or any other lien. In *Christy* v. *Dana,* 34 Cal. 553, foreclosure was sought against property conveyed by decedent in his life-time. The court held that it was not barred because not presented against estate of decedent, "as intestate at the time of his death had no interest in the land." In *Sichel* v. *Carrillo,* 42 Cal. 505, mortgage by a wife on her separate property, to secure note of the husband, was sought to be foreclosed, and it was held not to be barred by failure to present claim against the estate of husband. In *Schadt* v. *Heppe,* 45 Cal. 433, foreclosure was sought against property set apart to widow as a homestead. The claim was not presented, and it was held not to be barred, as "the estate has no interest whatever in the property mortgaged." In *Pittee* v. *Shipley,* 46 Cal. 154, the question arose squarely,

and the court held that a mortgage upon property which becomes general assets of the estate is barred if the claim is not presented within 10 months. In the case at bar a judgment had ripened into a lien in the life-time of intestate. After his death the widow asserted title under an unrecorded deed, which is held to be fraudulent as against creditors. This deed is binding upon intestate and his heirs, but is voidable as to creditors. The property is not a general asset of the estate; hence the cases above cited (*Christy* v. *Dana*, *Sichel* v. *Carrillo*, and *Schadt* v. *Heppe*) must govern. This suit to enforce that judgment lien, and no more, and as the mortgage is sought to be foreclosed against the estate, may be maintained. For these reasons I concur in the decision of this case.

PORTER, J.—I concur in the judgment of affirmance.

[Civil No. 176. Filed October 4, 1887.]

[S. C. 15 Pac. 141.]

In re Estate of W. J. Baldridge, Deceased. JAMES REILLY, Appellant, v. C. S. CLARK, Respondent.

1. EXECUTORS AND ADMINISTRATORS—APPOINTMENT AND REMOVAL—COMP. LAWS ARIZ. 1877, p. 268, par. 1617, CITED—POWER OF REMOVAL DISCRETIONARY—APPELLATE COURT WILL NOT INTERFERE UNLESS ABUSE OF DISCRETION IS CLEARLY SHOWN.—The probate court has the power, under statute, *supra*, to remove an administrator upon the application of a non-resident heir, when the rights of those interested in the estate, shall, in the opinion of the court, require it. Appellate courts will not interfere with a probate judge in the exercise of his discretion in the removal of an administrator, unless he has clearly abused that discretion.

2. APPEAL AND ERROR—FINDING BASED UPON PROOF TECHNICALLY DEFECTIVE WILL NOT BE DISTURBED WHERE SUBSTANTIAL JUSTICE HAS BEEN DONE—AFFIDAVITS TAKEN BEFORE JUSTICE OF THE PEACE WITHOUT THE TERRITORY—COMP. LAWS ARIZ. 1877, p. 473, par. 2863—IDEM, p. 475, par. 2871 CITED.—Where affidavits were taken before a justice of the peace, without the territory, for the purpose of proving the petitioner to be the father of the intestate, and upon

said proof the probate court found such to be the fact, this court is not disposed to disturb the finding, though there be technical defect in the proof, as substantial justice has been accomplished. Statutes cited, *supra*.

3. EXECUTORS AND ADMINISTRATORS—APPOINTMENT AND REMOVAL—IS PARTNER PROPER PERSON TO ACT AS ADMINISTRATOR—COMP. LAWS ARIZ. 1877, p. 262, par. 1569, subd. 11, CITED.—Where it appears that the administrator removed was jointly interested in certain law suits with decedent which said administrator was to prosecute and did prosecute under statute, *supra*, does it not make it doubtful whether or not he was the proper person to administer upon said estate?

4. COMP. LAWS ARIZ. 1877, p. 263, par. 1584, CONSTRUED.

APPEAL from a Judgment of the District Court of the First Judicial District in and for the County of Cochise. Affirmed.

The facts are stated in the opinion.

Goodrich & Smith and Thos. Mitchell, for Appellant.

George G. Berry, for Respondent.

WRIGHT, C. J.—This case was originally appealed from the probate court of Cochise county to the district court therein, and from the latter court it has been brought here. James Reilly, the appellant, had been the administrator of the estate of W. J. Baldridge, deceased, for several years; but on the twenty-second day of March, 1886, the judge of said probate court, after citation as the law directs, removed the said Reilly, upon the petition of Henry T. Baldridge, father and heir of the deceased, and appointed C. S. Clark, the respondent, administrator of said estate. From this order the appellant appeals; and the main point upon which he replies for a reversal of the judgments of the courts below is that the said probate court had no power to grant the prayer of the petition.

Did the probate court in its action herein transcend its power? Perhaps no office sustains so close a relation with

the people as that of probate judge. He is the paramount guardian of the county. He has the delicate and responsible duty to guard the interest of the estates of minors and widows. His duty is just as imperitive to also guard the interests of those estates, where there are neither minors nor widows. Perhaps in no department of official life are the trusts reposed by law—more sacred than here. Once in every three or four decades, the estates of the citizens pass through the process of administration. Administrations and guardianships have not always been economical and pure, probably nowhere has there been greater abuse of trusts in this country, than in administrations and guardianships.

The legislature has conferred upon probate judges a large measure of discretionary power in appointing and removing administrators, guardians, etc. Is it not unreasonable to suppose that the legislature would impose duties so delicate, responsible, and even sacred, without at the same time conferring plenary power to discharge those duties in such manner as to subserve the best interests of the estates?

Counsel for the appellant refer us to the opinion of Judge Sawyer in *Re Estate of Carr*, 25 Cal. 586; but we think the cases are not quite similar. There, Bolton, a brother-in-law of the deceased, had been appointed to administer, but failed to qualify. Mark Carr, a brother of the deceased, then applied, but the court, in the exercise of its discretion, denied his application. Then Bennett & Addison, strangers, filed their petition asking that letters issue to them; accompanying which were written requests from Bolton and wife, and Mark Carr, that said petition be granted. As the judge of probate had already judicially determined that neither Bolton nor Carr was competent to administer,—the former because he was unable to give bond; the latter for want of integrity,—the judge also denied this petition. Was this a stretch of judicial discretion? Judge Sawyer thought not, and sustained the action of the probate judge. Will it be pretended, however, that Judge Sawyer, in this decision, means to say that where a party, otherwise entitled under section 67 to administer, is disqualified by reason of non-residence, and a stranger has received letters of administration, this party has no right to petition for, or the probate

judge has no right to order, the removal of the distasteful administrator? Is it not the logic of such a position that in such case there would be no remedy? The party entitled cannot ask to have himself appointed, by reason of non-residence, and the court has not the power to revoke and appoint anybody else. What is to be done? We think, in such case, the probate judge, under the California statute, could either grant or refuse a petition, and his action in either case would be entirely legitimate,—clearly within the sphere of his legal functions. Perhaps one reason that influenced the probate judge in the exercise of this discretionary power was that the Carr estate was already in the hands of the public administrator, an officer sustaining most intimate relations with, and under the absolute control of, the probate judge. Besides, all the parties were residents of the state of California.

Here, Henry T. Baldridge, the father, was and is a non-resident, being a citizen of the state of Tennessee. At the time letters of administration were granted upon his son's estate he was not present, and could not have known whether appellant was a proper person to administer or not. It seems, however, that after the lapse of nearly four years he, and the probate judge as well, concluded that for the good of the estate a change ought to be made. A change was made. The administrator objected on the ground, substantially, that as, by reason of non-residence, the father could not administer, he had no right to ask, and the probate judge had no power to grant, administration to anybody else.

The great purpose for which courts of probate were established was to provide a legal channel through which estates should be transmitted from ancestors to heirs. This was and is the primary object; of course, the payment and collection of debts, etc., are incidental thereto. Where there are no debts the heir is entitled to a speedy admission to his inheritances. In this case there were no debts; and yet, after the lapse of nearly four years, the administrator is reluctant to surrender his charge. Why? True, he impugns the motives of respondent and his attorney; but, if the imputation were true, would their improper motives jus-

tify his wrongful action? Is that really a matter about which he has a right in this behalf to complain? If Baldridge has made a bad selection in securing the respondent to represent him in an estate that is now rightfully his by inheritance, should it concern the appellant? No tie of consanguinity existed between him and the intestate. Now, it is the policy of the law to prevent the wasting of estates in litigation. This may have been an additional reason prompting the action of the probate judge. It seems that appellant during his four years of administration spent $1,300, and incurred additional liabilities to the extent of $900, and had only collected $850, and at the same time had become involved in five, and may be six, law-suits.

Appellant's counsel contend that these proceedings were had under section 67, *c.* 29, Comp. Laws 1877, and that under that section the probate court could not remove appellant and appoint respondent. But it is a familiar rule of construction that the whole act must be taken together, and section 67 is not the only section in the act conferring power of removal upon the probate judge. Our view of that section is that it simply confers a right upon the surviving husband or wife, child, father, etc., to obtain the revocation of letters granted to any one else, and administer themselves; provided they are resident within the jurisdiction, and are otherwise qualified; and that it leaves the determination of these preliminary questions entirely with the court. Section 100 of the same act, however, provides, after declaring that any executor or administrator may resign his trusts after settling up his accounts, and delivering all the estate to the person appointed by the court, that "if by reason of any delays in such settlement and delivering up of the estate, *or for any other cause,* the circumstances of the estate, or the *rights of those interested* in the estate, *shall, in the opinion of the court,* require it, *the court* may, before such settlement of the accounts and the delivering up of the estate shall have been completed, *revoke the powers* or letters testamentary or of administration of such executor or administrator, and appoint in his stead an administrator," etc. Without the aid of this section, the probate judge might in certain cases have been unable to afford adequate remedy,

against a wasteful administrator, to the party entitled to the estate; as in this case, where the father and heir to the estate, by reason of non-residence, could not administer. We think the probate judge had ample power, under the circumstances, to remove the appellant. Appellate courts will not interfere with a probate judge in the exercise of his discretion in the removal of an administrator, unless he has clearly abused that discretion. See *Deck* v. *Gherke*, 6 Cal. 667.

Another point relied on is that there was no legal proof that the petitioner was the father of the intestate. Substantially, we think there was. True, there was a technical defect in the proof. The affidavits were taken before a justice of the peace in the state of Tennessee. Section 427, c. 48, Comp. Laws, 1877, *directs* that affidavits taken in another state or territory, to be used in this territory, shall be taken before a commissioner appointed by the governor of this territory, or before a judge, notary public, or clerk of a court, having a seal. The judge of the county court of Sumner county, Tennessee, certifies to the characters of the affiants for veracity, etc., and the clerk of said county court certifies, under seal of that court, to the official character of that judge, and to the genuineness of the justice's signature, etc. Section 435 of said chapter of the Compiled Laws authorizes any justice of the peace in another state or territory, selected by the officer granting the commission, to take depositions to be read in evidence in this territory. Whether there was a substantial compliance with our law or not, in taking the affidavits, ought that to affect the real question here? The proof seems to have been sufficient to convince the mind of the probate judge. He found the fact, and we are not disposed to disturb that finding. Whether Henry T. Baldridge was the father of W. J. Baldridge, the deceased, or not, was certainly a question of fact, which it was proper for the probate judge to determine. We doubt not, substantial justice has been accomplished, and that the facts are as the judge found them to exist. We cannot see what right the appellant has to complain.

It is not always technically legal proof, to produce conviction in the minds of the triers of facts. There are prob-

ably but few cases tried, into which by inadvertance or otherwise, more or less illegal testimony does not come. Very many lawyers persist in drawing testimony from their witnesses by the illegal method of leading questions. In this case, however, we do not think the appellant has been wronged.

There was another question raised by counsel for the respondent in his brief, and which also appears in appellant's answer, viz., that said administrator, Reilly, was not a proper party to administer on said estate, by reason of his having a partnership interest in a considerable portion thereof. Section 52, p. 262, of said Compiled Laws of 1877, provides that where there is any partnership between the deceased and any other person at the time of the decease, that person shall in no case be appointed administrator. Reilly admits, in his answer, that by an agreement with the intestate, on account of the latter's inability to pay costs, lawyers' fees, etc., he had a half interest in certain lawsuits which he was to prosecute, and did prosecute. This may also have had something to do with his removal. At all events, does it not make it doubtful whether or not appellant was the proper person to administer upon said estate?

We think the judgment should be affirmed, and it is so ordered.

Barnes and Porter, JJ., concur.

[Civil No. 194. Filed October 18, 1887.]

[S. C. 15 Pac. 139.]

THE TERRITORY OF ARIZONA, EX REL. JOHN J. HAWKINS, Petitioner, v. W. E. WINGFIELD, Chairman of the Board of Supervisors of Yavapai County, Respondent.

1. STATUTES—CONSTRUCTION—RECONCILIATION OF ACTS PAST AT SAME TIME—LAWS 1885, ACT NO. 75, p. 138, § 31, AND LAWS 1885, ACT NO. 105, p. 293, § 13 AND § 19, RELATING TO THE SALARY OF CERTAIN COUNTY OFFICIALS, CONSTRUED—DUTY OF COURTS TO HARM-

ONIZE INCONSISTENT STATUTES.—Where plaintiff had acted as probate judge and county school superintendent of Yavapai County he was entitled under the statutes, *supra*, to compensation from both the "General Salary Fund" and the "School Fund." These statutes were passed at the same session of the legislature and approved the same day. Statutes passed on the same day, and to take effect at the same time, will all be assumed to have been enacted at the same time, and are to be construed as of one act. Such construction should be given, if possible, as shall leave all to stand. If this cannot be done, only so much is to be disregarded as cannot stand. Distinct affirmative propositions should stand as against mere negations or provisos. The courts are continually called upon to revise the results of careless legislation. This they must do as best they can by known rules of construction.

Original application for writ of Mandamus. Petition granted.

The facts are stated in the opinion.

John J. Hawkins, for Petitioner.

Briggs Goodrich, Atty. Gen., for Respondent.

BARNES, J.—This is an action for *mandamus*. During the years 1885 and 1886 the relator was the probate judge of the county of Yavapai, in the territory of Arizona, and for said time was the county superintendent of public schools for said county. The defendant is now the duly-qualified chairman of the board of supervisors of said county of Yavapai.

The Thirteenth legislative assembly of the territory of Arizona passed an act entitled "An act to establish a public school system, and to provide for the maintenance and supervision of public schools in the territory of Arizona," which said act was approved March 12, 1885. Section 31 of said act provides, among other things, that the county superintendent of schools of the county of Yavapai shall have an annual salary of $600, payable quarterly out of the "School Fund" of said county, by a warrant drawn upon said fund in favor of such county superintendent, *countersigned* by the chairman of the board of supervisors of

said county. The said Thirteenth legislative assembly of Arizona also passed on the same day an act entitled "An act to create the office of county assessor, to make the county treasurer *ex officio* county tax collector, and prescribe the salaries and duties of certain county officers of the county of Yavapai." Approved March 12, 1885. Section 13 of said last-mentioned act provides that the probate judge of the county of Yavapai shall receive to his own use as full compensation for all services rendered by him as judge of the probate court, *ex officio* county superintendent of public schools, and as clerk of the probate court, including all services rendered by deputies, the salary of $2,000, etc. Seciton 19 of said last-mentioned act provides for the payment of such salary out of a fund created by said act known as the "General Salary Fund," on warrants drawn by the board of supervisors upon such fund. These acts were passed by the same legislature, and were approved on the same day; and at the same time five acts relating to salaries of county officers were considered and passed, viz., one for each of the counties of Cochise, Mohave, Apache, Pima, Graham, and Yavapai. All these acts were approved March 12th, except Cochise and Mohave, which were approved on March 11th. Statutes passed on the same day, and to take effect at the same time, will all be assumed to have been enacted at the same time, and are to be construed as of one act. Such construction should be given, if possible, as shall leave all to stand. If this cannot be done, only so much is to be disregarded as cannot stand. Distinct affirmative propositions should stand as against mere negations or provisos.

In this case, it is enacted that the county superintendent of schools shall have an annual salary of $600, payable out of the "School Fund." This is a positive, affirmative enactment. It is also enacted that the probate judge shall receive, in full for all services as judge, *ex officio* superintendent of schools, and clerk, etc., a salary of $2,000, payable out of the "Salary Fund." This is a positive, affirmative enactment. The two salaries are payable out of different funds. If they be construed to mean that the $2,000 only shall stand, it repeals the former, or, rather, destroys it. The salary of $600, and the provision providing for it out

of this school fund, falls. It is evident that it was intentional for the school fund to provide for the salary for its superintendent of schools. But to limit it to the $2,000 from the salary fund destroys that intention. There is but one way to construe these acts that both shall stand; that is, to hold that the probate judge shall receive a salary of $2,000, and the superintendent a salary of $600, as is provided, but discard the limitation or provisio that the probate judge shall receive, *as full compensation for all* services as judge and superintendent of schools, etc. The acts recognized the fact that, by law, the judge is *ex officio* superintendent of schools: that he holds the offices and performs the duties of both; the compensation and salary is fixed for each, and the fund from which he is to be paid for each service is provided, The officer is entitled to the salary so appropriated, and, though the same person, he is entitled to both salaries. The courts are continually called upon to revise the results of careless and sometimes reckless legislation; to try to make consistent that which is inconsistent; to harmonize that which is full of discord. This they must do as best they can by known rules of construction. *Red Rock* v. *Henry,* 106 U. S. 596, 1 Sup. Ct. Rep. 434; *United States* v. *Walker,* 22 How. 299; *Clay Co.* v. *Savings Soc.,* 104 U. S. 579; *Fussel* v. *Gregg,* 113 U. S. 550, 5 Sup. Ct. Rep. 631; *Louisiana* v. *Taylor,* 105 U. S. 454; Sedg. Const. St. 198, 209; *Cain* v. *State,* 20 Tex. 355.

The prayer of the petitioner is granted. Let the writ issue.

Wright, C. J., and Porter, J., concur.

[Civil No. 193. Filed November 29, 1887.]

[S. C. 15 Pac. 712.]

T. L. STILES, Assignee, Plaintiff and Respondent, v. THE WESTERN UNION TELEGRAPH CO., Defendant and Appellant.

1. TELEGRAMS—DELAYS IN DELIVERING MESSAGES—GROSS NEGLIGENCE

—DAMAGES—CONTRACT LIMITING LIABILITY.—Plaintiff, as assignee of Hudson & Co., bankers, brings this action to recover damages for delay in delivering a telegram. Plaintiff, on the evening of the assignment, delivered a telegram to defendants with instructions to forward it immediately to a branch house of assignors. The agent of defendant received the message in ample time to deliver it before banking hours in the morning, but withheld it. The bank opened and defendant's agent withdrew money belonging to himself and his company. Other depositors also withdrew funds. The message was then delivered and the bank remained opened for a half hour longer. Certain terms limiting liability were affixed to the message. *Held*, that defendant's agent was guilty of gross negligence and palpable misconduct; that no terms annexed to the message could excuse the same, and that the company was liable for all money withdrawn prior to the time of the delivery of the message but not for such as was voluntarily paid out thereafter.

BARNES, J., dissenting. The act of the agent in withholding the message being willful the defendant was liable for all injury consequent upon the wrong. Punitive damages would have been proper.

APPEAL from a Judgment of the District Court of the First Judicial District in and for the County of Pima. Reversed.

The facts are stated in the opinion.

C. C. Stephens, (Richard Brinsley Carpenter, of counsel), for Appellant.

Even if the Company's agent did wilfully delay the delivery of the telegram for the purpose of drawing his money out of the bank, it was an act entirely outside of the scope of his authority, and, as a matter of law, the company is no more responsible for his act, than would be a railroad company when its conductor shoots a passenger, or an engineer maliciously and wilfully runs a traveller down, who, on a highway, is crossing a track; or, when he recklessly or maliciously or unnecessarily blows the whistle of his engine and causes a team travelling on a highway parallel to the railroad to run away. *Hahn* v. *R. R. Co.*, 51 Cal. 607; *Little Miami R. R. Co.* v. *Witmore*, 19 Ohio St. 110, 2 Am. Rep. 373; *Evansville, etc. R. R. Co.* v. *Baum*, 26 Ind. 70; *Priest* v. *Hudson*

River R. R. Co., 65 N. Y. 589; *Peeples* v. *Brunswick, etc., R. R. Co.*, 60 Ga. 281; Rorer on R. R., pp. 324, 325, 842.

Upon the broader ground of the measure of damages it is a well established rule of law, that only such damages can be recovered as are natural and proximate consequence of the act complained of; compensation for injury received; commensurate with it; nothing more or less. 2 Black Comm., 438; Greenleaf on Ev. 256; *Griffin* v. *Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Eowood* v. *Western Union Tel. Co.*, 45 N. Y. 549; Sedg. on the Measure of Dam. Vol. 1, p. 39. The defendant can not be held liable for what occurred after the message was placed in the hands of the officers of the bank.

The law does not allow damages for avoidable consesequences. *Hamilton* v. *McPherson*, 28 N. Y. 77, 84 Am. Dec. 330, *Milton* v. *Hudson River Steamboat Co.*, 37 N. Y. 214; *Grindle* v. *Eastern Exp. Co.*, 67 Maine, 317, 24 Am. Rep. 31; *Miller* v. *Mariners' Church*, 7 Greenl. Rep. 51, 20 Am. Dec. 341; *Baldwin* v. *United States Tel. Co.*, 45 N. Y. 744, 6 Am. Rep. 165; Sedg. on the Measure of Damages, pp. 93-95 and cases cited.

John Haynes, and J. A. Anderson, for Respondent.

"A principal who contracts to do a particular thing is liable for his agent's torts which prevent the performance of the contract." Wharton on Agency, Sec. 487. The fact that appellant is a corporation does not alter the rule. Morawetz on Corporations, Sec. 95.

But aside from all that, the appellant has ratified the acts of its agent, and therefore stands as though it had ordered the message withheld. The money was deposited in the name of the appellant, as shown directly by the testimony of Eccleston, though Kingsbury testifies that about $1000 of it was his, and the remainder belonged to the Company. After being fully informed of the circumstances by Mr. Stiles' letter, and afterward by the complaint in this action, the appellant has retained the fruits of its agents wrong, and therefore has fully ratified his act. Morawetz, Sec. 96.

The burden of proving that the damages which have been

sustained in such cases could have been prevented, unquestionably rests upon the party guilty of the breach of contract. *Hamilton* v. *McPherson,* 28 N. Y., 76-7, 84 Am. Dec. 330, *Costigan* v. *Mohawk C. R. Co.,* 2 Denio 609, 43 Am. Dec. 758. That therefore was a question of fact which was tried and decided, and the Court found against the appellant, and this court will not disturb findings of the trial court where there is substantial evidence to sustain them. *Tombstone M. Co.* v. *Way Up. M. Co.* 1 Ariz. 426, 25 Pac. 794; *Burter* v. *County of Pima* (Ariz.), 11 Pac. 62; *Frey* v. *Lowden,* 70 Cal. 550, 11 Pac. 838; *Kill* v. *Tubbs,* 32 Cal. 332; *Miller* v. *Balthasser,* 78 Ill. 302.

The great weight of authority favors the proposition that contracts of telegraph companies limiting their liability are against public policy. *Bartlett* v. *Western Union Tel. Co.,* 62 Maine, 209, 16 Am. Rep. 437; *Thompson* v. *Western Union Tel.,* 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644; *Tyler* v. *Same,* 60 Ill. 421, 14 Am. Rep. 38; *Western Union Tel. Co.* v. *Tyler,* 74 Ill. 168, 24 Am. Rep. 279; *Marr* v. *Western Union Tel. Co.,* 85 Tenn. 529, 3 S. W. 496; *Western Union Tel. Co.* v. *Hyer Bros.,* 22 Fla. 637, 1 Am. St. Rep. 222, 1 South. 129.

PORTER, J.--This cause comes here on motion for a new trial on the grounds of insufficiency of the evidence, the findings and decisions being against law, and errors in law. This action was brought by T. L. Stiles, as assignee of Hudson & Co., against the Western Union Telegraph Company, to recover damages for the delay in the delivery of a telegraphic message sent by the plaintiff from Tucson to Tombstone. It appears that Hudson & Co. on the ninth day of May, 1884, had a banking-house in Tucson, with a branch establishment at Tombstone. Mr. M. B. Clapp, to whom the message was sent, was the cashier of the branch house, and there managed the bank. That on the evening of the ninth of May an assignment of all the property of Hudson & Co., both at Tucson and at Tombstone, was made to T. L. Stiles. Thereupon, on acceptance of the trust, the plaintiff, assignee, on the evening of the ninth of May, sent by defendant a telegram to Clapp, and

with directions to forward the telegram immediately. The telegram was received by the operator at Tombstone at 9:15 of May 9th, and not delivered till the morning of the 10th, between 9:15 and 9:30, and after the bank was opened for business. The telegraph office at Tombstone was less than two blocks from the bank. Clapp's residence was in the same town, and he was there on the evening of the 9th. The usual time for delivering dispatches, when too late the night before, was from 8:30 to 9 A. M. The office of the telegraph company was opened at 8 o'clock A. M. The bank opened at 9 o'clock A. M. Before the delivery of the message the operator (Kingsberry) drew from the bank the sum of $1,167.71, and other smaller sums were withdrawn from the bank before the message was delivered.

On the opening of the bank on the 10th, the money in the vaults had been placed upon the trays on the counter for the day's business. On the reception of the dispatch, Clapp, the cashier, told the employes of its contents, and directed to have the money put back in the vaults, and then went to see plaintiff's attorney, and in the mean time directed the bank to be kept open. The business was on until the attorney came, and put up notice, which was one-half hour after the delivery of the message. The sum of $5,102.19 was paid out to unpreferred creditors, including the sum of $1,167.71 paid on the check of the operator. The operator testified that $1,000 of the $1,167.71 belonged to him, and the balance to defendant. The books of the bank show an itemized statement of the amounts drawn out by each depositor, and among them is Western Union Telegraph Company, $1,167.71. But that fact is immaterial. There can be no dispute but that the conduct of the operator was grossly negligent, and the defendant cannot be relieved of responsibility caused by his misconduct. No terms annexed to the message can excuse this failure to deliver the message before the opening of the bank; such failure to deliver being gross negligence and palpable misconduct, and the telegraph company must bear every legitimate consequence of its non-delivery.

But does that consequence involve anything which in this case happened after the message came to the hands of the bank? The telegraph company must be held for every dol-

lar paid out before the message was delivered. We can see no good reason why it should be for the money afterwards paid, for any payment made after the delivery of the message were entirely voluntary on the part of the bank. A justification is sought because of the fear of a mob. No such exhibition existed, and the excuse cannot be sustained. The teller testified that he paid checks because he feared, if he did not, that a rush would be made on them; that when he left the bank a large crowd had assembled there; but while the bank remained opened for business there was no excitement, and but four people there outside of the employes. Why could not the employes of the bank have closed the outside doors, and then put the money in the vaults? Besides, it would take only a few moments to handle $20,000 or $30,000, which amount was in the trays in which coin is usually kept in banks. It not being otherwise shown, we take it that most of the money, as it is the custom of banks in Arizona, was in gold coin, and only silver enough to make change.

We must conclude that the finding "that, by reason of said failure to deliver message, the plaintiff paid out to unpreferred creditors the sum of $5,102.19," is erroneous. The record does not disclose the full amount paid out before the delivery of the message, saying only it was "other smaller sums," and there must be a new trial, unless plaintiff will, by written consent, accept from defendant the sum of $1167.71 with legal interest from the ninth day of May, 1884, in which case judgment for that sum is ordered to be entered.

WRIGHT, C. J., (concurring.) We are clearly of the opinion that the defendant should not be held liable for amounts of money paid out after the dispatch was received at the bank. It required only a moment's time to step to the front door of the bank, and close it. The law in such case does not hold the defendant responsible for avoidable damages. Undoubtedly a large portion of the money paid out would have remained in the bank if it had been closed immediately upon the reception of the dispatch. I therefore concur.

BARNES, J., (dissenting.) The evidence in this case shows that the operator of defendant at Tombstone withheld the message from about 9 o'clock in the evening, "on purpose," as he swears, that he might draw out the money deposited to credit of defendant in the bank; that he waited until the bank opened, then went in, and drew out the funds of defendant. He kept the fact of the assignment secret until then. He then went to his office, and handed the telegram to the messenger boy, who had to make a letterpress copy and enter it on the delivery-book, put it in an envelope, and address it, and then go to the bank and deliver the message. Meantime the bank was open in due course of business. This was a willful, and not a negligent act of the operator. He was not simply speculating on the information containcd in the message to his profit, but he was using the information to his profit and the customer's injury. The defendant, after full knowledge of the facts, ratified the act, and refused to refund the money so wrongfully drawn out. The defendant is liable for all injury to plaintiff consequent upon this willful wrong. Smart money or punitive damages would have been proper. 2 Thomp. Neg. 851; *Davis* v. *Western Union Telegraph Company*, I Cin. Rep. 100; 2 Thomp. Neg. 1264; *Edelmann* v. *St. Louis T. Company*, 3 Mo. App. 503; *Levenworth Company* v. *Rice*, 10 Kan. 426; *Jackson* v. *Schmidt*, 14 La. Ann. 807; *Illinois Central Railroad Company* v. *Welch*, 52 Ill. 184; *Murphy* v. *New York, etc., Railroad Company*, 29 Conn. 496; *Welch* v. *Durand*, 36 Conn. 182, 4 Am. Rep. 55; *Whipple* v. *Waipole*, 10 N. H. 130; *Hawes* v. *Knowles*, 114 Mass. 518, 19 Am. Rep. 383; *Jacobs* v. *Louisville, etc., Railroad Company*, 10 Bush, 263; *Bass* v. *Chicago, etc., Railway Company*, 39 Wis. 636; *Peoria Railroad Company* v. *Loomis*, 20 Ill. 251, 71 Am. Dec. 263; *Wallace* v. *New York*, 2 Hilt. 442; *Wallace* v. *New York*, 18 How. Pr. 169.

True the officers of the bank ought to have closed the bank when informed of the message; but if they did not, who should suffer? They were not plaintiff's agents. They were joint and several wrong-doers with defendant after the message was delivered. Before that they were his unwitting instruments. The wrong-doer who wrongfully and will-

fully caused the bank to open, should be responsible for his agents, or the instruments of his wrong. To say that a telegraph company, a common carrier of messages, may use the information so received to the injury of a customer, and not be responsible for the injuries consequent to the customer, is monstrous. For these reasons I dissent from the opinion of the court.

[Civil No. 215. Filed December 22, 1887.]

[S. C. 15 Pac. 862.]

J. L. GANT, Plaintiff and Respondent, v. N. M. BROADWAY, Defendant and Appellant.

1. SALES—CHATTELS—DELIVERY TO AVOID STATUTE OF FRAUDS—COMP. LAWS ARIZ. 1877, p. 363, par. 2128 CITED.—The acts that will constitute delivery of a chattel vary and depend upon the character and quantity of the property sold as well as the circumstances of each particular case. The same acts are not necessary to the delivery of a ponderous article as would be required in an article of small bulk.

2. SALES—DELIVERY OF CHATTEL IN HANDS OF BAILEE—TRANSFER OF RIGHT OF POSSESSION CONSTITUTES DELIVERY.—Transfer of title and right of possession of bulky chattels in the hands of bailee constitute delivery.

APPEAL from a Judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Affirmed.

The facts are stated in the opinion.

A. C. Baker, for Appellant.

The sale relied upon by appellee is attacked in this case under Sec. 15, Chap. 36, Comp. Laws, that law being in force at the time of trial. It is contended that the evidence fails to show any delivery of the hay or that there was any

change of possession. *Merrill* v. *Hurlburt,* 63 Cal. 94, 49 Am. Rep. 78; *Bell* v. *McLellan,* 67 Cal. 283, 7 Pac. 689.

We complain of the instructions because they introduce the test of actual fraud to the jury, whereas the intent of Sec. 15, Chap. 36, Comp. Laws, was to make the absence of certain things conclusive evidence of fraud, viz: Immediate delivery followed by actual and continued change of possession. *Wood* v. *Bugby,* 29 Cal. 475.

H. B. Lighthizer, for Respondent.

The main issue in this case is as to whether or not the sale relied upon by appellee was accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold, within the meaning of Sec. 15, Chap. 36, C. L. The charge as a whole, fairly submitted the case to the jury on such issue, and that some of the instructions may be subject to verbal criticism is not sufficient cause for disturbing the verdict or judgment. *Brooks* v. *Crosby,* 22 Cal. 43.

That the hay in suit was "bulky and difficult of access," clearly appears from the evidence, so that the court very property instanced it as a fit subject for constructive delivery. *Chaffin* v. *Doub,* 14 Cal. 387, 73 Am. Dec. 656; *Lay* v. *Neville,* 25 Cal. 552.

Actual change in the situation of cumbersome property under circumstances which of themselves preclude the idea of fraud is not essential to an immediate delivery and continued change of possession within the meaning of the statute. *Godchaux* v. *Mulford,* 26 Cal. 325, 85 Am. Dec. 178. *Woods* v. *Bugby,* 29 Cal. 475.

An agreement of a third party, in possession at the time of the sale, to hold for the vendee is equivalent to a delivery. Benj. on Sales, Sec. 17; *Montgomery* v. *Hunt,* 5 Cal. 366; *Cartwright* v. *Phoenix,* 7 Cal. 282. The sale to Gant was as notorious as was the previous ownership of Thompson. *Stevens* v. *Irwin,* 15 Cal. 503, 76 Am. Dec. 500; *Hersthal* v. *Myers,* 53 Cal. 626; Benj. on Sales, Secs. 179, and 679, note "N."

The question whether or not the sale was made to defraud creditors was not an issue in the case.

BARNES, J.—This was a suit in replevin of hay in bale. Defendant justified seizure as sheriff by virtue of attachment against one Thompson. It appeared in evidence that the hay had been cut and baled and piled up by one Kellogg on his farm, and that he had sold the hay to Thompson where it stood. That thereafter Thompson sold the hay to Grant, plaintiff. When Gant purchased, he said he would buy it, if Kellogg would let the hay stay where it was until he wanted to move it. Kellogg assented to it, and Grant bought and paid for the hay. He had moved none of it when defendant seized it as Thompson's hay by virtue of an attachment issued in favor of Goldman. The cause was tried by a jury, and the appellant, the defendant below, assigns for error the charge of the court, which was as follows:

The court gave the following instructions to the jury for the plaintiff: "The jury are instructed: (1) That a delivery of personal property must be a transfer of possession and control, made by the seller with the purpose and effect of putting the goods out of his hands. This is sufficient delivery, whatever its form. Hence it may be constructive, as by delivering the key of a warehouse, or even a receipt, or without such when the goods are bulky and difficult of access, as in the case of the hay in suit." "(3) Actual change of the situation of cumbersome property is not necessary to the immediate delivery and actual and continued change of possession required by our statutes to render a sale valid as against the creditors of the vendor, so that other circumstances connected with the sale preclude a continued ownership of possession in the vendor, and which, taken altogether, exclude from the transaction the idea of fraud. (4) When the goods at the time of the sale are in the possession of the third party, an actual receipt by or delivery to the vendee takes place when the vendor, the purchaser, and the third party agree that the latter shall cease to hold the goods for the vendor, and shall hold them for the purchaser." "(7) The jury are further instructed that, under the evidence, the possession of Thompson of the property in dispute, as

derived by his purchase thereof from Kellogg, the property still remaining on the premises of the latter at the time of the sale by Thompson to plaintiff, was at best but a constructive possession; and that, therefore, any *bona fide* change of property therein, from Thompson to plaintiff, which would give to the latter the immediate control of the same, and his (the plaintiff's) ownership as open and notorious as was the previous ownership of Thompson, and of such character as to the apparent custody of the property as to put one dealing with the vendor, with respect to such property, upon inquiry, or such at least as might suggest a change of ownership, would constitute such an immediate delivery, and actual and continued change of possession, as to render the sale valid as against the creditors of Thompson, and entitle plaintiff to a verdict. (8) If the jury believe from all the evidence that, by the terms of the sale from Thompson to plaintiff, the property in dispute was, before the levy thereon by defendant, placed unequivocally within the power and under the exclusive dominion of plaintiff, as absolute owner, discharged of all lien for the price, or that the change of ownership was substantial and permanent as between the parties to said sale, and that the apparent custody of the property was such as to put one dealing with the vendor with respect to it upon inquiry, or such, at least, as might suggest a change of ownership, or that there was such advertisement of the plaintiff's claim as would enable an ordinary prudent man to ascertain that he could no longer rely on his knowledge of the former ownership of Thompson, then, as a matter of law, would said sale be valid as against the attaching creditors of Thompson, and the jury will find for the plaintiff. (9) The jury are further instructed that, if they believe from all the evidence that the plaintiff, in good faith, purchased the property in dispute from Thompson before the levy thereon by defendant, and that, by the terms of such purchase, the plaintiff took immediate possession and control thereof, and that there was such advertisement of plaintiff's claim as would enable an ordinary prudent man to ascertain that he could no longer rely on his knowledge of the ownership of the former proprietor, (Thompson,) then will the jury find for the plaintiff."

The question raised was whether there was what in law amounts to a delivery of the chattels. The statute provides (Comp. Laws, 2128) that every sale by a vendor of chattels in his possession or under his control, unless the same be accompanied by delivery, and followed by an actual and continued change of possession, shall be conclusive evidence of fraud, as against creditors. As was said in *Lay* v. *Nevill*, 25 Cal. 553, "the acts that will constitute a delivery will vary in the different classes of cases, and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case. The same acts are not necessary to make a good delivery of a ponderous article, like a block of granite or a stack of hay, as would require in case of an article of small bulk, as a pound of bullion." To the same effect is *Chaffin* v. *Doub*, 14 Cal. 384.

In this case, Kellogg was the ostensible owner of the hay. He had cut it, baled and piled it up on his land. Had his creditors levied upon it, the question would have been clearly before the court. Thompson's possession was constructive and good as between him and Kellogg. He transferred to Gant all the titled and possession he had. Kellogg had given him permission to leave it where it was, and Kellogg gave to Gant the same permission. Kellogg being the ostensible owner, and apparently in the possession, a stranger is charged with notice of his possession. But his possession is not attacked; it is Thompson's, who was not ostensibly in possession. Thompson never had any actual possession; and when the levy was made, he had no right or title. That had passed to Gant. The issues were fairly presented. We see no error in the charge. The judgment is affirmed.

Wright, C. J., and Porter, J., concur.

[Crim. No. 42. Filed December 29, 1887.]

[S. C. 15 Pac. 673.]

THE TERRITORY OF ARIZONA, Plaintiff and Respondent, v. SOL. BARTH, Appellant.

1. GRAND JURY—IMPANELING—EXCUSING JUROR—PRESUMPTION IN AB-

SENCE OF FACTS ON APPEAL THAT COURT ACTED PROPERLY—COMP. LAWS ARIZ. 1877, p. 120, par. 590, and p. 121, par. 592, CITED.—Where a juror was excused by the trial court, in the absence of the facts, this court will presume that the court acted properly. Statutes cited, *supra*.

2. CHANGE OF VENUE—PROPERLY REFUSED—COMP. LAWS ARIZ. 1877, p. 131, par. 699 AND p. 132, par. 701 CITED.—Where an application for change of venue, made on the ground that a fair and impartial trial could not be had in the county, supported by four affidavits, was resisted by a showing of fourteen affidavits denying the existence of prejudice against the defendant, the application was properly refused. Statutes cited, *supra*.

3. TRIAL—CONTINUANCE—GRANTING DISCRETIONARY—WILL BE REVIEWED FOR ABUSE—ABSENCE OF WITNESSES—AFFIDAVIT MUST SHOW THE FACTS PROPOSED TO BE PROVEN CLEARLY, THAT THEY ARE MATERIAL AND WHERE A WITNESS IS TO BE CONTRADICTED THAT HIS TESTIMONY IS FALSE.—Granting of continuance is discretionary with the trial court. For abuse of discretion error may be assigned, and the cause reversed. The showing for continuance on account of absence of witnesses must clearly state the facts which defendant expects to prove by said absent witnesses and such facts must be made to appear material. If it is expected to contradict anticipated testimony then the fact that such testimony is false should be stated. (Territory v. Barth, 319.)

4. FORGERY—EVIDENCE—TESTIMONY OF ACCOMPLICE—COMP. LAWS ARIZ. Ap. 137, par. 757, CITED—CORROBORATIONS—PRINCIPAL AND ACCESSORY.—Evidence of forgery in raising amount of county warrant reviewed and held sufficient. Where principal witness was an accomplice, and statute, *supra*, requires corroboration, evidence that defendant indorsed the warrant, received the money for the same, and made false enteries in his books concerning it, is complete. In forgery he is the principal who directs the false writing to be made for his use, and utters the forged instrument.

5. CRIMINAL LAW—INSTRUCTIONS TO JURORS—DEGREE OF CERTAINTY IN PROOF.—Proof of guilt to a moral certainty is not required in a criminal case.

APPEAL from a Judgment of the District Court of the Third Judicial District in and for the County of Yavapai. Affirmed.

The facts are stated in the opinion.

Howard, Herndon & Hawkins, and E. M. Sanford, for Appellant.

Briggs Goodrich, Atty. Gen., for Respondent.

BARNES, J.—This was an indictment against defendant, Solomon Barth, accusing him of the crime of forgery of a county warrant, with a count for uttering said forged warrant. Defendant urges as error the refusal of the court to quash the indictment for irregularity in the formation of the grand jury. Defendant was present at the time the grand jury was impaneled, and given an opportunity for challenge, which he declined to accept, on the ground that he had not been held to bail for this offense, and was under no accusation. Leaving the question whether he has waived his right of challenge, we will consider the alleged irregularity. Section 176, Comp. Laws, *c.* 11, provides for an order summoning 24 persons, to serve as a grand jury which order was made in this case, and the sheriff returned 24 persons served, and they all appeared. Section 178 provides that the names of persons in attendance be written on separate ballots, and put in a box, from which the grand jury shall be drawn, which was done; but the court of its own motion excused the sixth person whose name was drawn, and this is the error assigned. It does not appear for what reason this juror was excused. To know whether the excuse was justified or not the facts should be made to appear. We must assume, in the absence of the facts upon which the court acted, that the court acted for good reason, and not arbitrarily. Suppose the juror had been deaf and dumb, blind, intoxicated, or for any other reason disabled from jury service, no one can doubt for a moment the power and duty of the court to excuse the juror. The court should excuse a juror for any apparent disqualification, and we must assume that the court acted properly. Having excused this juror 23 persons remained, the number the law provides to constitute a grand jury, and it was organized with those persons. In this it does not appear that the court erred.

It is urged that the court erred in refusing to grant a

change of venue. Application was made on the ground that "a fair and impartial trial" could not be had in the county. Comp. Laws, 699. The statute provides that, if the court "is satisfied that the representation is true," the venue may be changed. Id. 687. The plaintiff filed his own affidavit, and affidavits of three others, of facts tending to show that such a prejudice existed against defendant in the county to such an extent as would prevent a fair trial. This was met by the affidavits of 14 persons living in different parts of the county denying the existence of such prejudice. The defendant was simply overwhelmed by the evidence, and the court very properly refused the change.

Error is assigned in the refusal of the court to grant a continuance. This is a motion addressed to the sound discretion of the court, and for the abuse of such discretion error may be assigned, and the cause reversed. *Territory* v. *Davis*, Ante p. — 10 Pac. 359; *People* v. *Francisc*, 38 Cal. 183. We do not think there was such an abuse of discretion in this case as requires a reversal. It does not appear clearly that the testimony of the witnesses Lee, Eoff, and Bibo could be procured at a time to which the case could be postponed. But the fatal error to this showing is that the facts which defendant expected to prove by the witnesses are not clearly stated, nor are they made to appear to be material. In the main they suggest that they will contradict or discredit a witness named Silvers. It is true that an emergency might arise in the trial in which such testimony would be competent. For all that appears in the affidavit, Silvers would admit every fact expected to be proved, and in that case the evidence would be incompetent. Besides, the affidavit nowhere states that the testimony of the witness Silvers, which the affidavit anticipates, is untrue. If true, the proposed evidence would avail nothing. The witness Silvers might be filled with prejudice; might have been hired to remain in the jurisdiction of the court for the purpose of being a witness; might have even threatened to put defendant in Yuma, and yet his testimony be true. This the defendant should have negatived, and shown to the court that the proposed testimony was material to meet *false testimony* of the witness. By the witness Eoff he expected to prove that the

said writing was "not uttered and forged as true," as alleged. This is a conclusion of both law and fact. The facts should have been stated. We think the court did not err in refusing to continue the case. We will not review all the errors assigned. The demurrer was properly overruled. The indictment sufficiently alleges a forgery of this instrument, and in the second count the uttering of an alleged instrument knowing it to be false and forged.

The evidence shows that a general county warrant was issued to Patterson & Co. for lumber, for $91.24, signed by Luther Martin, chairman of the board, and Charles Kinnear, clerk of the board; that J. B. Patterson, one of the company, took the warrant to defendant's store, and handed it to Harry Silvers, defendant's clerk. He had spoken to defendant about it, who told him he was giving 80 cents on the dollar for county warrants. Silvers gave a check for 80 per cent of the amount of the warrant. The check was signed by defendant.

The alleged warrant was offered in evidence, and was for $190, and was the same warrant delivered to Silvers by Patterson. Silvers testified that defendant told him that he expected a warrant from Patterson, and told him to pay 80 cents on the dollar for it, and signed a check in blank to pay for it with. Silvers put the warrant in the safe with other warrants. A few days after defendant asked Silvers for all the warrants, which were given to defendant, and he shortly returned with them, and Silvers noticed this to be for $191, instead of $91, and called defendant's attention to it, who told him to keep his mouth shut. At defendant's direction, this warrant with others were sent to a bank at Prescott for discount. Defendant indorsed the warrant. The alterations were made in the handwriting of Kinnear. There was evidence of several other warrants altered in the same way, discounted at the same time. It is urged that the witness Silvers is an accomplice, and that his testimony is not corroborated. Comp. Laws, 344. We think the corroboration is complete. The defendant indorsed the warrant; received the money for the same; false entries appeared in his books as to it; in fact, the whole case together demonstrates that defendant was engaged in a conspiracy to buy and raise warrants. He had corrupted the clerk of the board to aid him, and give the

appearance of genuineness to the county warrants. He had induced his book-keeper, Silvers, to aid him under his direction. He was the prime mover, the chief actor, the arch-conspirator, the principal, in this criminal transaction. The writing was not in his hand, but it was by his direction, and is as much his act as if he had written the words himself. He is not an accessory in any sense. An indictment which alleges that defendant forged, is proved by evidence that the false writing is made by his direction, and for his use, and followed by proof that he uttered the forged instrument. He was the principal offender. The whole case evinces an amount of turpitude and criminal intention that is appalling. How the jury could have been led to have recommended him to the mercy of the court we cannot understand. His guilt was made clear by the evidence. Of that there can be no doubt, and the evidence upon which this conclusion rests is both competent and convincing. Such an infamous conspiracy, as is here shown, having as one of its actors a trusted officer of the county, and its purpose the wholsesale robbery of the funds of the county, should be met with sure and swift punishment. And it is well that the principal actor, a man of wealth, power and influence, a merchant of many years, as this record discloses, should be the first convicted, rather than visit the blame upon his mere instruments, the clerk of the board and his own book-keeper.

After a careful examination of the whole case, we see no such error as warrants a reversal of the case. The instructions as a whole, submit the case fairly to the jury. We will notice but one objection to the charge. The court instructed the jury that the law presumes defendant to be innocent "until such strong proof of his guilt of the offense charged shall be adduced as to remove every reasonable doubt of his guilt. A reasonable doubt, however, means a substantial doubt, arising from the evidence, and not a mere possibility of the defendant's innocence. If, upon the whole case, the jury entertain a reasonable doubt of the defendant's guilt, they should acquit;" and refused to instruct that "by reasonable doubt is meant that the state of the case which leaves the mind of the jury in that condition that they cannot say they feel an abiding conviction, to a *moral certainty*, of the

truth of the charge;" and that "the evidence must establish the truth of the charge to a reasonable and moral certainty." We think the court was correct in the charge. There is nothing more difficult than to attempt to make clear what is meant by the reasonable doubt that will warrant an acquittal. The words themselves perhaps convey the idea as accurately as a paraphrase can do. To say that proof to a moral certainty is required, is misleading. Whatever may be the meaning of those words to scholastics, to a common mind it requires a much higher degree of proof than is necessary in a criminal case. To require proof to a moral certainty would make it impossible to enforce the criminal law. In a civil cause, a mere preponderance of evidence governs the verdict; in a criminal case, the mind of the jury must be convinced of the truth of the charge. That is all. To be convinced means that the evidence must be such that the reason sees no doubt left of the defendant's guilt. The law does not deal with doubts that the imagination may conjure up. The mind may not run outside the evidence in search for doubts; the reason must detect and point them out in the evidence alone, and direct the mind to stop short of being convinced. When the mind so hesitates from conviction, there exists a reasonable doubt. If the mind, on the other hand, rests satisfied and convinced, all reasonable doubt is removed. It is that condition of mind as leads reasonable men in the important affairs of life to act with confidence and not to pause and hesitate and say "I am not satisfied," after a consideration of all the facts bearing upon the proposition. Ordinary men can and do understand this; but to ask for a moral certainty startles the mind with doubt and uncertainty which may not be removed by any evidence, however convincing to the reason. Such is not the demand of the law. *Commonwealth* v. *Costley*, 118 Mass. 1; *State* v. *Reed*, 62 Me. 162; *People* v. *Guidici*, 100 N. Y. 403; *Arnold* v. *State*, 23 Ind. 170; *Miles* v. *United States*, 103 U. S. 304; *People* v. *Finley*, 38 Mich. 482; *Maguire* v. *People*, 44 Mich. 286, 38 Am. Rep. 265, 6 N. W. 669; *State* v. *Bridges*, 29 Kan. 138; *Massey* v. *State*, 1 Tex. App. 564; *Densmore* v. *State*, 67 Ind. 306, 33 Am. Rep. 96; *Batten* v. *State*, 80 Ind. 394; *Holmes* v. *State*, 9 Tex. App. 313; *State* v. *Rover*, 11 Nev. 348; *Mixon* v. *State*, 55

Miss. 527; *Myers* v. *Commonwealth*, 83 Pa. St. 142; *Anderson* v. *State*, 41 Wis. And see *People* v. *Ah Sing*, 51 Cal. 372; Judge Shaw in *Commonwealth* v. *Webster*, 5 Cush. 320, 52 Am. Dec. 711; *Allen* v. *Fox*, 10 Amer. Law Rep. 642; 3 Greenl. Ev. § 29, and note; Starkie, Ev. 507.

The judgment of the district court is affirmed.

Wright, C. J., concurs.

PORTER, J.—I concur; and on the question of reasonable doubt will add that explanations of reasonable doubt confuse more than they make clear. In *Miles* v. *United States, supra.*, the court says: "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury."

[Civil No. 214. Filed December 29, 1887.]

[S. C. 16 Pac. 45.]

J. L. B. ALEXANDER and BERNARD GOLDMAN, Plaintiffs and Respondents, v. THOMAS SHERMAN, C. L. HALL and C. H. GRAY, Defendants and Appellants.

1. MINES AND MINING—MORTGAGE OF MINING CLAIM—ABANDONMENT OF LOCATION BY MORTGAGORS CANNOT DEFEAT MORTGAGE.—After the delivery of a certificate of sale under foreclosure of mortgage upon mining claims an attempt on the part of the mortgagors to abandon the location, so that re-locations might be made to defeat the lien of the mortgage, is void, all rights of the mortgagors having passed to the purchasers under foreclosure, and the re-locations made pursuant thereto vest no title.

2. SAME—MINING CLAIMS PROPERTY—MAY BE DEALT WITH AS OTHER PROPERTY—LIENS THEREON PROTECTED.—Mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged and inherited. If mortgaged, the rights of the mortgagees shall be protected against any attempt of the mortgagors to defeat them by abandonment, and courts of equity should protect these liens as fully as securities upon any other species of property.

APPEAL from a Judgment of the District Court of the Second Judicial District in and for the County of Maricopa. Affirmed.

W. W. Porter, Judge.

The facts are stated in the opinion.

E. J. Edwards, for Appellants.

The question of abandonment was raised by the defendant's answer and was one of the issues submitted to the jury. It was a question of fact to be passed upon by a jury, and the court could not deprive the defendants of the right of trial by jury, which was practically done, when it set aside the special verdict and gave judgment for plaintiffs. *Taylor* v. *Middleton,* 67 Cal. 656, 8 Pac. 594; *Richardson* v. *McNulty,* 24 Cal. 339; *Davis* v. *Perley,* 30 Cal. 360; *Weil* v. *Mining Co.,* 11 Nev. 200.

A mining claim is personal property and the court erred in admitting in evidence, the foreclosure proceedings, and mortgage. If a mining claim was ever classed as real estate, certainly the Act of Feb. 12, 1875, removed all doubt as to the character of such property. Sec. 5, Chap. 33, Comp. Laws, p. 334. The repealing clause of that act, not only repealed the former chapter, but everything in conflict with it.

H. N. Alexander, and Goodrich, Street, Smith and Goodrich, for Respondents.

At the time of the attempted abandonment in writing by Cox and Demarbaix of the "Red Rover Mine," they had no such interest in the mining property as could be abandoned. The attempt was a conspiracy and collusive fraud between them and defendants Sherman, Hall, and Greenhaw to defeat the mortgage liens of plaintiffs and other mortgagees.

The question of abandonment is sometimes a question of law, again merely a question of fact, and sometimes a mixed question of both law and fact. To the facts proven or admitted the court applies the law. Abandonment and forfeiture are different things; one a question of intention, the

other a question of law. *Oreamundo* v. *Uncle Sam Mining Co.*, 1 Nev. 179; *Neil* v. *Mining Co.*, 11 Nev. 200. There can be no such things as abandonment of land in favor of a particular individual and for a consideration. *Stephens* v. *Mansfield*, 11 Cal. 363; *Richardson* v. *McNulty*, 24 Cal. 339-345; *Morenhout* v. *Wilson*, 52 Cal. 263-268. *Derry* v. *Ross*, 5 Col. 295-300-301. It is well settled now that a mining claim is real property—property in the highest sense of the word. *Forbes* v. *Gracey*, 94 U. S. 767; *Belk* v. *Meagher*, 104 U. S. 283-284-285-290; *Halsey* v. *Martin*, 22 Cal. 645; *Hughes* v. *Delvin*, 23 Cal. 506.

BARNES, J.—This action was brought to quiet title to an unpatented mining claim, located by Joseph Cox and John Demarbaix on the thirty-first day of January, 1881. On the seventeenth day of March, 1884, Demarbaix mortgaged his interest in the mine to Myrtle Godchaux, for $4,500, payable six months after date. The mortgage was an ordinary quitclaim deed in form, with a defeasance. The mortgage was foreclosed, and on the thirtieth day of December, 1884, Lindley H. Orme, the sheriff of Maricopa county, sold the property, under a decree of foreclosure and order of sale, to Myrtle Godchaux for the sum of $250, and delivered to him a certificate of sale. The certificate of sale was assigned to the plaintiffs, and on the sixth day of August, 1885, N. M. Broadway, then sheriff of Maricopa county, successor to said Orme, executed and delivered to the respondents a deed to the property. The plaintiffs claim title through the foreclosure of the Godchaux mortgage.

The appellants contend that the mine had been abandoned by Cox and Demarbaix, and rely upon a subsequent location thereof. It was conceded that over $100 worth of work was done on the mine by the locators for the years 1881, 1882, 1883, and 1884, and by plaintiffs for the years 1885 and 1886. Plaintiffs derived title from a mortgage by locators foreclosed before the end of 1884. The annual work, called assessment work, made the title good as against the government. On the eighteenth of May, 1885, the ground was located by defendants as public and unoccupied mineral lands open to location. It is clear that this location was procured

by the mortgagors in order to defeat the mortgagees, and was a fraud upon the mortgagors. Any attempt by them to abandon the mine was void. All their rights had passed to the mortgagees, and they could not abandon and by so doing defeat the mortgage. To permit such a subterfuge to defeat a mortgage would be to give to fraud the sanction of a court of equity. *Keller* v. *Berry*, 62 Cal. 488; *Stephens* v. *Mansfield*, 11 Cal. 363; *Richardson* v. *McNulty*, 24 Cal. 339; *Morenhaut* v. *Wilson*, 52 Cal. 263; *Derry* v. *Ross*, 5 Colo. 295. For the purposes of collecting taxes, mining claims have been listed and sold both as personal property, (*Forbes* v. *Gracey*, 94 U. S. 762; *Waller* v. *Hughes*, 11 Pac. 122,) and as real estate. "They are property in the fullest sense of the word." "This claim may be sold, transferred, mortgaged, and inherited." *Forbes* v. *Gracey*. If mortgaged, the rights of mortgagees shall be protected against any attempt of mortgagors to defeat them by abandonment, and in a proper case courts of equity can and should protect these liens as fully as securities upon any other species of property.

Other questions raised need not be discussed, as this determines the rights of plaintiffs, and defeats the rights of defendants. The judgment is affirmed.

Wright, C. J., and Porter, J., concur.

MEMORANDUM DECISIONS

THE TOMBSTONE MILL AND MINING COMPANY, Respondent, v. THE WAY-UP MINING COMPANY et al., Appellants. (Civil No. 116.)

APPEAL from an order of the District Court of the Second Judicial District in and for the County of Cochise reforming defendants' cost bill.

Lewis and Dibble, and J. D. Rouse, for Appellants.

John Haynes, G. G. Symes and Thomas Mitchell, for Respondent.

January 7, 1887. Affirmed.

A. L. HENSHAW, Appellee, v. OSCAR LINCOLN, Appellant. (Civil No. 180.)

APPEAL from the District Court of the Second Judicial District in and for the County of Maricopa.

Edwards and Chalmers, for Appellant.

Baker and Hudson, Sumner Howard and Briggs Goodrich, for Appellee.

January 7, 1887. Dismissed.

HENRY A. TWEED, Appellee, v. F. C. HATCH, Appellant. (Civil No. 182.)

APPEAL from the District Court of the Second Judicial District in and for the County of Maricopa.

No appearance for Appellant.

Sumner Howard, for Appellee.

January 7, 1887. Dismissed.

J. W. ANDERSON, Appellee, v. M. W. STEWART, Appellant. (Civil No. 181.)

APPEAL from the District Court of the Second Judicial District in and for the County of Maricopa.

No appearance for Appellant.

Sumner Howard, for Appellee.

January 7, 1887. Dismissed.

J. L. B. ALEXANDER, Appellee, v. N. A. MORFORD, Appellant. (Civil No. 184.)

APPEAL from the District Court of the Second Judicial District in and for the County of Maricopa.

No appearance for Appellant.

Sumner Howard, for Appellee.

January 7, 1887. Dismissed.

JAKE MARKS, Appellee, v. WILLIAM CHRISTY, Appellant. (Civil No. 183.)

APPEAL from the District Court of the Second Judicial District in and for the County of Maricopa.

No appearance for Appellant.

Sumner Howard, for Appellee.

January 7, 1887. Dismissed.

EX PARTE: IN THE MATTER OF CHARLES DOUGLAS, Petitioner. (Unnumbered.)

APPLICATION for writ of *habeas corpus*.

Herndon and Hawkins, for the Petitioner.

Briggs Goodrich, Atty. Gen., for the Territory.

January 8, 1887. Judgment allowing writ and ordering petitioner released.

MORRIS GOLDWATER, Respondent, v. J. W. BRUCE et al., Appellants. (Civil No. 161.)

APPEAL from the District Court of the First Judicial District in and for the County of Pima.

Haynes and Styles, for Appellants.

J. A. Anderson, for Respondent.

January 22, 1887. Dismissed on stipulation.

JOHN C. HANDY, Appellant, v. CHAS. J. JEFFORD et al., Respondents. (Civil No. 208.)

APPEAL from the District Court of the First Judicial District in and for the County of Pima.

Haynes and Styles, for Appellants.

Earll, Campbell and Stephens, for Respondents.

April 29, 1887. Dismissed.

E. J. WHITE, Appellee, v. JOHN O. DUNBAR, Appellant. (Civil No. 207.)

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

Goodrich and Smith, for Appellant.

William Herring, for Appellee.

April 29, 1887. Dismissed.

P. MINOR, Appellant, v. THE SAN PEDRO LUMBER COMPANY, Appellee. (Civil No. 178.)

APPEAL from the District Court of the Second Judicial District in and for the County of Maricopa.

Webster Street and Briggs Goodrich, for Appellant.

A. C. Baker, for Appellee.

April 29, 1887. Dismissed by consent.

J. T. SIMMS, Appellant, v. JAMES FLAHERTY, Appellee. (Civil No. 179.)

APPEAL from the District Court of the Second Judicial District in and for the County of Maricopa.

No appearance for Appellant.

A. C. Baker, for Appellee.

April 29, 1887. Dismissed.

TERRITORY OF ARIZONA, Respondent, v. JOHN R. WARD et al., Appellants. (Criminal No. 40.)

APPEAL from the District Court of the First Judicial District in and for the County of Graham.

William Lovell, for Appellants.

Briggs Goodrich, Atty. Gen., for Respondent.

April 29, 1887. Dismissed.

BENONI BLACKMORE, v. JAMES REILLY. (Civil No. 199.)

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

No appearance for James Reilly.

Geo. G. Berry, for Benoni Blackmore.

April 30, 1887. Dismissed.

LYDIA M. CLARK, v. PASQUAL NIGRO. (Civil No. 200.)

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

Geo. G. Berry, for Lydia M. Clark.

William Herring, for Pasqual Nigro.

April 28, 1887. Dismissed.

M. E. CLARK, Respondent, v. ALEXANDER WRIGHT et al., Appellants. (Civil No. 201.)

APPEAL from the District Court of the Second Judicial District in and for the County of Cochise.

James Reilly, for Appellants.

G. Gordon Adam, for Respondent.

April 30, 1887. Dismissed.

JAMES REILLY v. M. E. CLARK. (Civil No. 198.)

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

James Reilly, *in persona*.

Geo. G. Berry, for M. E. Clark.

April 30, 1887. Dismissed.

NANCY BLAND et al., Respondents, v. JOHN CHART et al., Appellants. (Civil No. 192.)

APPEAL from the District Court of the Third Judicial District in and for the County of Yavapai.

L. F. Eggers, for Appellants.

Rush, Wells and Howard, for Respondents.

September 29, 1887. Dismissed.

MALCOLM McCRAIGE, Appellee, v. ERNEST STORM et al., Appellants. (Civil No. 216.)

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

E. R. Monk, for Appellants.

James Reilly, for Appellee.

September 29, 1887. Dismissed.

MALCOLM McCRAIGE, Appellee. v. OTTO GUESENHOFFER et al., Appellants. (Civil No. 217.)

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

E. R. Monk, for Appellants.

James Reilly, for Appellee.

September 29, 1887. Dismissed.

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

Territory of Arizona,

During the Year 1888.

[Crim. No. 210. Filed January 10, 1888.]

[S. C. 16 Pac. 209.]

THE TERRITORY OF ARIZONA, Plaintiff and Respondent, v. ROBERT CONNELL, Defendant and Appellant.

1. INTOXICATING LIQUORS—LICENSE—UNIFORMITY—R. S. ARIZ. 1887, p. 396, par. 2239 and p. 395, par. 2236 CONSTRUED AND HELD CONSTITUTIONAL.—Statutes, *supra*, providing that the rate of license for a liquor dealer be fixed at $50 per quarter, and that the rate for wayside inns be $10 per quarter, and that apothecaries and physicians be exempt, and for punishment for violation of the law, are not void for want of uniformity, being uniform as to each class, and the classification is reasonable and within the power of the legislature to make.

2. TERRITORIES—EXTENT OF LEGISLATIVE POWER—LIMITATIONS—PROVISIONS OF CONSTITUTION OF UNITED STATES—BILL OF RIGHTS—UNIFORM OPERATION OF LAWS—R. S. ARIZ. 1887, p. 515, par. 2858, CITED.—The principle of uniformity is differently stated in various state constitutions, which must each be construed by their terms. The territories have no such constitutional restrictions. Their legislative power is only limited by the constitution and laws of the United States. It would be inconsistent with the constitution for a territory to levy an excise tax that is lacking in the requirement of uniformity, though it would be otherwise as to a

direct tax. The so-called bill of rights of this territory is no more than any other legislative enactment and can make no limitation upon the powers of the legislature. An act which acts uniformly upon all of a class has a uniform operation within the meaning of R. S. Ariz. 1887, p. 515, par. 2858, cited.

3. CONSTITUTIONAL LAW—INJUSTICE IN OPERATION OF LAW—COURTS CANNOT ANNUL LAWS ON ACCOUNT OF.—That a law is unjust is not a question of law. Courts cannot annul tax laws because of their operating unequally and unjustly.

4. CONSTITUTIONAL LAW—LEGISLATURES—POLICE REGULATIONS.—Laws regulating liquor dealers, saloon keepers, hawkers, etc., and imposing a license thereon are within the police powers of the legislature.

APPEAL from a Judgment of the District Court of the Third Judicial District in and for the County of Yavapai. Affirmed.

The facts are stated in the opinion.

John A. Rush and Sumner Howard, for Appellant.

The revenue law of 1887, so far as it imposes a license tax is oppressive, irregular and void for the reason that it being a territorial tax, does not apply "equally" and with "uniformity" to all wholesale and retail dealers in spirituous and malt liquors (or either) in the territory, but on the contrary, makes a material discrimination between such dealers as a class, varying the amount of license tax to be paid; the distinction and difference in the amount to be paid by dealers being made dependent upon the place or places in said territory where the business of selling liquors is to be carried on. Said difference, distinction, and want of uniformity and equality, is arbitrary. In taxing the business or occupation of the citizen for state, territorial, county or municipal revenue, the principal of uniformity and equality within the limits of the territory in which the tax is imposed and for whose benefit the revenue is raised, as applied to classes of business or occupation is universally recognized as fundamental. See Art. 17, p. 26, Comp. Laws; Cooley's Constitu-

tional Lim. p. 499; also 501-2-3-4, note to 507, and note to 509, 515, 516.

The Constitution of the United States provides that "All duties, imposts and excises shall be uniform." 1 Bouvier Law Dict. p. 455; *Loughborough* v. *Blake,* 5 Wheat. 318; *People* v. *Coleman,* 4 Cal. 46, 60 Am. Dec. 589; *People* v. *McCreery,* 34 Cal. 460; *City of Lexington* v. *McQuillan,* 9 Dana 513, 35 Am. Dec. 163 to 167; People v. Township Board, Vol. 9, American Law Register, page 488, and cases cited therein; *Gerrard Co.* v. *Nav. Co.,* Vol. 10 Am. Law Reg. pp. 154-155; Bill of Rights, Comp. Laws, page 26, Art. 17.

As to what is uniform operation, see State v. Boyd, 19 Nev. 43, 5 Pac. Rep. 735-6; *Zeigler* v. *Gaddis,* 44 N. J. Law, 365. *Comm.* v. *Patton,* 88 Pa. St. 260; *City of Newton* v. *Atchison,* 31 Kan. 151, 47 Am. Rep. 486, 1 Pac. 295-7.

License taxes must be uniform. Stimson's Am. St. Law, page 88. It must reach all of a class. Cooley on Tax. 128-129 (Note) pp. 178-180, 230 (Note).

John C. Herndon, Dist. Atty., for Respondent.

PORTER, J.—The defendant in this case was prosecuted for a violation of section 2239 of the Revised Statutes by selling liquors in less quantities than one quart without a license therefor. He was found guilty, and sentenced to pay a fine according to section 2236, Rev. St. From that judgment he appeals to this court. He urges that the law is void, for the reason that it is a mere tax, and lacks the requirement of uniformity in this: that the rate for a license to a liquor dealer is fixed at $50 per quarter, and the rate for one who sells liquors at a wayside inn or station is fixed at $10 a quarter, and exempts a physician or apothecary who sells liquors used in the preparation of medicines. The act in question requires a license of liquor dealers, saloon keepers, hawkers or peddlers, theaters and shows, billiard table keepers, brewers and distillers, and gamblers. If it be considered merely as a tax and having no other object the general idea of uniformity is required. It belongs to that class of taxes imposed in the form of duties, imposts, and excises. They often take the form of license fees for permission to carry

on particular occupations or to enjoy special franchises. The rate may be determined by the amount of business done, or profits earned, or they may be direct upon property in proportion to its value, or upon some other basis of apportionment which the legislature shall regard as just. Cooley, Const. Lim. *c.* 14, and cases cited. Such laws are within the taxing power. Perfect accuracy cannot be attained. If the rate were the same for all liquor dealers, he who sold most at largest profit would be taxed least, yet no one would say such a law violates the principle of uniformity. A law fixing the rate by profits would be theoretically uniform; yet such a law would be impracticable. Profits are controlled by so many facts, good management, favorable location, and other ever-changing conditions, that such a law could not be enforced. The law declares that all who sell liquors within five miles of a town or city shall pay one rate and the keeper of a wayside inn or station another rate. There is uniformity as to each class, and the classification is reasonable and within the power of the legislature to make. *Marmet* v. *State,* 45 Ohio St. 63, 12 N. E. 463; *Cleveland* v. *Tripp,* 13 R. I. 50; *Bishop* v. *Tripp,* 15 R. I. 466, 8 Atl. 692; *Anderson* v. *Brewster,* 44 Ohio St. 576, 9 N. E. 683.

It must be remembered that the principle of uniformity is stated in different forms in the several state constitutions, each one of which must be construed by its terms. *City of St. Louis* v. *Spiegel,* 90 Mo. 587, 2 S. W. 839; *Davis* v. *Gaines,* 48 Ark. 370, 3 S. W. 184; *Town of Highgate* v. *State,* 59 Vt. 39, 7 Atl. 898; *City of Allentown* v. *Adams,* (Pa.) 8 Atl. 430; *Taxpayers etc. Assn.* v. *Kirkpatrick,* 41 N. J. Eq. 347, 7 Atl. 625; *Adler* v. *Whitebeck,* 44 Ohio St. 539, 9 N. E. 672. The territories have no such constitutional limitations. The act of congress declares that "the legislative power of every territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." Section 8, art. 1, Const. U. S.: "The congress shall have power to lay and collect taxes, duties, imposts, and excises," etc.; "but all duties, imposts, and excises shall be uniform throughout the United States." By this clause "direct taxes must be laid and collected by the rule of apportionment; duties, imposts, and excises must be laid and collected under the rule of uni-

formity." *Veazie Bank* v. *Fenno,* 8 Wall. 541; *Hylton* v. *United States,* 3 Dall. 171; *Scholey* v. *Rew,* 23 Wall. 348.

It would be inconsistent with the constitution for a territory to levy an excise tax that is lacking the requirement of uniformity, though it would be otherwise as to a direct tax. Counsel refer to the so-called bill of rights of this territory. At best that is no more than any other legislative enactment, and can make no limitation upon the powers of the legislature, but this law is not inconsistent with any provisions thereof. Section 2858, referred to, declares that "all laws of a general nature shall have uniform operation." As we have said, the act before us acts uniformly upon all of a class, hence it has a uniform operation. *Youngblood* v. *Sexton,* 32 Mich. 406, 20 Am. Rep. 654.

It is urged that this law is unjust. But this not a question of law. The argument is presented to the wrong tribunal. "Courts cannot annul tax laws because of their operating unequally and unjustly; if they could, they might defeat all taxation whatsoever; for there never yet was a tax law that was not more or less unequal and unjust in its practical workings." *Youngblood* v. *Sexton,* 32 Mich. 406, 20 Am. Rep. 654.

Again, this legislation comes within the police power of the legislature. Liquor dealers, saloon keepers, hawkers, peddlers, theaters, shows, billiard table keepers, gamblers, brewers, etc., all of whom are by this act required to pay a license, belong to that class of trades which have ever been the subject of regulation under what are called the police powers. Such laws "are looked upon as police regulations established by the legislature for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances." Cooley, Const. Lim. 583, and cases cited. In a late unreported case sustaining the laws of Kansas prohibiting the manufacture and sale of intoxicating liquors, the supreme court of the United States reaffirms the power of the legislature to make such laws. If the power be granted, the legislative will must determine how the power shall be exercised. We see no error in this record, and the judgment of the district court must be affirmed.

Wright, C. J., and Barnes, J., concur.

[Civil No. 221. Filed January 11, 1888.]

[S. C. 16 Pac. 269.]

JOHN G. CAMPBELL et al., Plaintiffs and Appellants, v. WM. C. BASHFORD, Treasurer of Yavapai County, Defendant and Respondent.

1. TAXATION—EQUITABLE RELIEF—ADEQUATE REMEDY AT LAW—COMP. LAWS ARIZ. 1877, p. 340, par. 2021 CITED—BOARD OF EQUALIZATION—ERRONEOUS ASSESSMENT—PRESUMED TO KNOW WHEN ASSESSMENT ROLL IS COMPLETE—COMP. LAWS ARIZ. 1877, p. 340, par. 2020 CITED—LACHES.—A complaint for injunction against the collection of taxes based on erroneous assessment does not show any ground for equitable relief where it appears that provision is made by statute, *supra*, for protection of the tax-payer against unjust assessments, by the creation of a board of equalization, and that the complainant has failed to resort thereto. The fact that he had no knowledge of the increase in assessment cannot avail for he is charged with knowledge that the assessment roll is complete in ample time to appear before the board, statute *supra*, and by his own laches he cannot lay foundation for the jurisdiction of a court of equity.

APPEAL from a Judgment of the District Court of the Third Judicial District in and for the County of Yavapai. James H. Wright, Judge. Affirmed.

The facts are stated in the opinion.

Rush, Wells & Howard, for Appellant.

John C. Herndon, District Attorney, for Respondent.

BARNES, J.—This is a suit in equity to enjoin defendant, the tax collector of Yavapai county, from collecting a tax assessed against plaintiffs. They allege that, within the time prescribed by law, the assessor of said county called upon plaintiffs for a sworn list of their property subject to taxation, as required by law; that plaintiffs, in compliance with the assessor's demand, furnished him with a list of their property, containing a full and complete statement of all the prop-

erty, both real and personal, owned or possessed by them as partners, in said county, and subject to taxation therein, which list and statement was duly sworn to, as required by law; that said assessor accepted said sworn list and statement without objection, and without intimation that he was not satisfied with its correctness, and by his action caused plaintiffs to believe the said assessor was fully satisfied with the correctness of said list and statement, and that their property would be listed and assessed by him in accordance therewith; that said assessor afterwards, without any notice to them, and without their knowledge, set down upon the assessment roll and assessed to them double the quantity of personal property contained in said sworn list and statement; that plaintiffs did not own or possess said property so added by said assessor; that plaintiffs had no knowledge or information that said assessor had so added to the quantity of personal property contained in said sworn list and statement, until the time the board of equalization of that year was about to adjourn; that, within the time required by law, the plaintiffs tendered and paid to the tax collector of said county, the taxes due upon all the property so given in said sworn list and statement, including all the real estate belonging to plaintiffs, as partners; that said tax collector claimed that there was still due and owing from plantiffs the taxes due upon the quantity of property so added to the property contained in said sworn list, by said assessor; that said tax collector threatens and is about to advertise and sell plaintiff's real property, upon which they have duly paid the taxes, or enough thereof to pay the taxes on the property so added by the assessor; that said last-mentioned taxes are illegal and void; that, if said tax collector is permitted to advertise and sell said real estate, it will cast a cloud upon plaintiff's title, —and plaintiffs ask the decree of the court that said taxes upon said property, so added by said assessor, be declared illegal and void, and that said tax collector be enjoined and restrained from the collection thereof.

To plaintiffs' complaint the defendant filed a general demurrer, which demurrer the court sustained. The plaintiffs

appeal to this court from the order and judgment of the court below, sustaining defendant's demurrer to plaintiffs' complaint.

The question which meets us at the threshold in considering this case, is this: Does the complaint show any ground for equitable relief? If it appear that a party has an adequate remedy at law, he must go there, and the jurisdiction of a court of equity fails. By section 2021, Comp. Laws, it is provided that the supervisors of the county shall sit, in July of each year, as a board of equalization of taxes, and provides that they shall have power to hear all complaints, etc., may change and correct any valuation, either by adding thereto or deducting therefrom, etc. This section gives ample remedy to any aggrieved tax-payer. To that tribunal they should resort rather than to invoke the extraordinary remedy of injunction. No good reason is alleged for seeking this remedy. It is alleged that the assessor received the sworn list of plaintiffs, and made no objection thereto, and afterwards assessed them at a higher rate, and added additional property, without notifying them thereof, and they say they had no knowledge of it until the board was about to adjourn. It was then ample time to have made their complaint. They are, however, charged with a knowledge of the assessment roll required by law to be completed by the third Monday in June in each year, (Comp. Laws, § 2020,) and then they would have ascertained the fact, and they could then have sought to have had the assessment righted by the tribunal constituted by the law for that purpose. By their own laches they cannot be heard to lay the foundation for the jurisdiction of a court of equity.

For these reasons, the judgment of the court sustaining the demurrer is affirmed. It is not necessary to consider other questions raised as this disposes of the case.

Wright, C. J., and Porter J., concur.

[Civil No. 211. Filed January 10, 1888.]

[S. C. 16 Pac. 271.]

F. W. BLAKE, Plaintiff and Respondent, v. ELLEN J. THORNE, et al., Defendants and Appellants.

1. MINES AND MINING—ESTOPPEL BY DEED—RELOCATION—PARAMOUNT TITLE.—A person conveying a mining claim is estopped to deny the validity of the location. Relocation by grantor on the theory that the original location is invalid void as against grantee. If grantee had failed to do assessment work a valid relocation could be made by grantor and paramount title acquired from the United States.

2. SAME—PLEADING—EVIDENCE—NECESSITY OF PLEADING AND PROVING VALID ORIGINAL LOCATION IN SUIT TO QUIET TITLE AGAINST ONE ESTOPPED TO QUESTION.—In a case where defendant is estopped to question the original location plaintiff claiming under it need not allege or prove its validity.

APPEAL from a Judgment of the District Court of the Third Judicial District in and for the County of Yavapai. W. W. Porter, Judge. Affirmed.

The facts are stated in the opinion.

Rush, Wells & Howard, for Appellants.

The District Court had no jurisdiction of the subject matter of the action. *Brandt* v. *Wheaton,* 52 Cal. 433; *Reed* v. *Omnibus R. R. Co.,* 33 Cal. 217-8; *Gregory* v. *Pershbaker,* 73 Cal. 109, 14 Pac. 404; *LeDoon* v. *Tesh,* 68 Cal. 44, 6 Pac. 97, 8 Pac. 621; *Cochrain* v. *Bullion Min. Co.,* 4 Nev. 372; *Funk* v. *Sterrett,* 59 Cal. 614; Rev. St. U. S. Secs. 2319, 2320, 2322, 2324 and 2325.

The court will take judicial notice of the fact that the fee to the lands in question is in the General Government. *Brandt v. Wheaton, supra.*

The citizen, to maintain an action, either for the possession or the fee, must aver a compliance with the requirements of the act upon which he bases his title. If he fails to do this,

he fails to state facts sufficient to constitute a cause of action, and the court does not acquire jurisdiction. See cases cited *supra.*

The court erred in finding as a conclusion of law, that the defendant as the grantee of Symes was estopped by the deed of Symes and others from showing that the premises in controversy were not located in accordance with the Act of Congress on the 4th day of June, 1870.

E. M. Sanford, for Respondent.

A mining claim is real estate for all purposes. *Milton* v. *Lambard,* 51 Cal. 260; *Merritt* v. *Judd,* 14 Cal. 64; *Meced Min. Co.* v. *Fremont,* 7 Cal. 318, 68 Am. Dec. 262; *Pratus* v. *M. Co.,* 35 Cal. 34; *Watts* v. *White,* 13 Cal. 324; *McKeon* v. *Bisee,* 9 Cal. 142; *Hughes* v. *Devlin,* 23 Cal. 506.

Although the ultimate fee in our public mineral lands is in the United States, yet, as between individuals, all transactions, and all rights, interests and estates in the lands are treated as being an estate in fee, and as a distinct and vested right of property in the claims or claimants thereof, founded upon the possession. They are thus treated, as between the claimants and all persons but the United States, as the owners of the lands and the mines therein. *Hughes* v. *Devlin,* 23 Cal. 501; *Spencer* v. *Winselman,* 42 Cal. 483. The defendant cannot defeat the plaintiff's right to recover by showing an outstanding title in the United States, *Wilson* v. *Madison,* 55 Cal. 7; *Mining Co.* v. *Taylor,* 100 U. S. 37; *Fuller* v. *Harris,* 29 Fed. 817. The rules relating to estoppel *in pais* apply to mining ground the same as any other real estate claimed under similar kinds of title. *Kelly* v. *Taylor,* 23 Cal. 15. Naturally estoppel by deed likewise applies. For the elements of such estoppel see, *Merchants Bank* v. *State Bank,* 10 Wall. 604; *Ketchum* v. *Duncan,* 96 U. S. 666; *Brandt* v. *Va. C. & I. Co.,* 93 U. S. 326.

It was only necessary for us to show a resumption of the work and the doing of the assessment work for 1884. It would not be subject to relocation as against Symes until

1886. *Belcher* v. *Defferrari*, 62 Cal. 163; *Genn* v. *Russell*, 3 Mont. 358.

BARNES, J.—This was a bill to quiet the title to a mining claim. The claim in question was located by one Hutchison in 1879, and the notice was recorded. In August, 1882, Hutchison, Symes, and Thorne, by deed of quit-claim, conveyed this claim with others to the Silver Belt Company. Afterwards, plaintiff, Blake, became the purchaser of the claim by virtue of a judicial sale. The deed of the sheriff bore date April 27, 1886. The judgment was for $19,608.87, of date of July 26, 1884. In February, 1885, the said Symes located the ground as the Richmond mining claim, and in the same month he conveyed to defendant. It appears that work to the amount of $100 was annually done on the mine by the first locators, and those claiming under them, from the time of the first location.

It is contended that this judgment is erroneous, as there is no allegation or finding that the original location was properly made by discovery of ore, and placing monuments, etc., and that these facts are necessary to a good location. This proof, we think, was not necessary. Symes, by his deed to the Silver Belt Company, had made an implied covenant of his title. This title was based upon the Hutchison location. To that he gave faith and credit, and received the consideration for the sale of the same. This location, in 1885, was void, if the location of Hutchison was a valid location. He is estopped by his deed to deny the validity of the location upon which his title rested. Symes' after-acquired title by a location was good, only on the ground that the Hutchison location was not legally made; hence the title acquired by him by that location was not a subsequently acquired title from a paramount source. If Symes' grantees had failed to do assessment work, so called, he might have located and acquired a paramount title he is not estopped to set up. The United States was the common source of title, in whom was the fee. To allow locators of mining claims, or those holding under them, to be heard to deny the validity of their location,

and to attempt to acquire rights under the mining laws against those who buy titles on the faith of such locations, would destroy all credit in mining titles, upon which values running in the millions rest, (*Forbes* v. *Gracey*, 94 U. S. 762,) and open the doors to a flood of frauds. This cannot be thought of. Credit must be given to these titles by holding parties to good faith in dealing with them.

As between the parties, the title Symes conveyed must be held to be based upon a valid location. The United States are not a party to this cause, and are not barred by it. *Mining Co.* v. *Defferrari*, 62 Cal. 163; *Breeze Co.* v. *Haley*, 10 Colo. 5, 13 Pac. 913; *State Railroad Tax Cases*, 92 U. S. 617, and cases cited. The judgment is affirmed.

Wright, C. J., and Porter, J., concur.

[Civil No. 204. Filed January 17, 1888.]

[S. C. 16 Pac. 271.]

McALLISTER & McCONE, Plaintiffs and Respondents, v. THE BENSON MINING AND SMELTING COMPANY, Defendant and Appellant.

1. APPEAL AND ERROR—RECORD—FAILURE TO ASSIGN ERROR—COMP. LAWS ARIZ. 1877, p. 461, par. 2776-80 CONSTRUED—DISMISSAL.—Where the statement of the case is not certified in compliance with the statute, *supra*, only error in the judgment roll can be considered, upon which, there being no errors assigned, the appeal will be dismissed.

2. DEFAULT—SETTING ASIDE—NO ABUSE OF DISCRETION.—There is no abuse of discretion in the judge setting aside a default upon condition that the defendant go to trial immediately. Porter, J., dissenting.

3. MECHANIC'S LIEN—SMELTER WITHIN STATUTE.—A smelter is a "mill or manufactory" within the intent and meaning of the statute concerning mechanic's liens.

APPEAL from a Judgment of the County Court in and

for the County of Cochise. Webster Street, Judge. Appeal dismissed.

The facts are stated in the opinion.

Allen R. English, and Geo. G. Berry, for Appellant.

The court erred in denying defendant's motion for a continuance. The affidavit for continuance was sufficient. Chap. 48, Sec. 160, Comp. Laws. The counsel for plaintiff did not dispute the sufficiency of the affidavit for continuance. The sufficiency of the affidavit not being questioned, the case should have been continued as a matter of course. *People* v. *Brown,* 54 Cal. 242; *Beatty* v. *Sylvester,* 3 Nev. 228; *Choate & Brown* v. *Mining Co.,* 1 Nev. 73; *Turner* v. *Morrison,* 11 Cal. 22; *Alexander* v. *Byron,* 2 John. Cas. 318 et seq.; *People* v. *Brown,* 54 Cal. 243; *Black* v. *Appolonio,* 1 Mont. 342; *Hirsh* v. *Ferris,* 1 Colo. 403; *People* v. *Dodge,* 28 Cal. 447; *People* v. *Francis,* 38 Cal. 185; *Territory* v. *Kinney,* 3 N. Mex. 369, 9 Pac. 599, 9 West Coast Rep. 268; *People* v. *Lee,* 8 Pac. (Cal.) 239; *State* v. *Marshal,* 19 Nev. 240, 6 Pac. 672.

The court erred in decreeing the existence and subsistence of a lien which was and is not either at common law or under the statute, on such property, subject thereto. The law reads "manufactory," "mill," or "hoisting works." Laws Ariz. 1885, act 93, sec. 21. While mechanics lien laws should receive a liberal construction, yet the act will not subject property to a lien unless particularly enumerated therein.

Goodrich & Smith, for Respondents.

There was no abuse of discretion in refusing time to answer and certainly none where default was set aside on the express agreement that the rights of the parties should be immediately litigated. We have signed no stipulation that this is a full and correct transcript on appeal. The clerk can certify to papers filed, but certainly cannot certify as to what actually occurred at the trial. The Benson Smelter

is a "mill or manufactory" within the meaning of the Statute. The proposition is too plain for argument.

The objection to the affidavit for continuance is perfectly patent. It does not show who the witnesses are, that they ever were in Arizona, or that any of them know anything about reasonable charges in Arizona for this class of work. The evidence relied on is "expert" testimony. A continuance is never granted except to obtain facts within the knowledge of the witnesses. No ground for continuance was shown.

The statement on motion for new trial was never agreed to by us, nor has it been signed by the Judge. There is no showing of service of such statement on us. The statement is incorrect. It cannot under any authority, be considered by this court. The alleged statement on appeal, or on motion for new trial, is therefore no part of this record. This appeal then, is simply from the judgment roll. *De Johnson* v. *Sepulbeda,* 5 Cal. 149; *Loucks* v. *Edmondson,* 18 Cal. 203; *People* v. *Pacheco,* 27 Cal. 107; "The appeal will be dismissed unless the statement is agreed to by the attorneys of the respective parties or settled and authenticated by the court." *Cosgrove* v. *Johnson,* 30 Cal. 509.

WRIGHT, C. J.—This was a suit brought in the district court of Cochise county, for the foreclosure of a mechanic's lien. With the transcript on appeal is a paper, signed by appellant's attorney, which purports to be a statement on motion for a new trial; but it has no certificate showing that it was agreed to as correct, by the respective parties, or their attorneys, nor is there any certificate annexed thereto showing that the same was allowed by the judge, and was correct. No copy of this paper was served on the appellees, or their attorneys, so that there is really nothing here for this court to review. On appeals from original judgments, or orders, of trial courts, where there is no statement, appellate courts can only consider matters appearing in the judgment roll, and, as there was no assignment of errors on that, the appeal in this case will have to be dismissed.

The Revised Statutes of 1877, of this territory, are sub-

stantially the same as the California statute. The supreme court of that state have passed upon this question repeatedly, and have settled it beyond peradventure. In *Cosgrove* v. *Johnson,* 30 Cal. 510, Judge Sanderson, uses this language: "The statute prescribing the practice in motions for new trials is plain and simple, and there would seem to be no good reason why cases should be brought to this court upon a defective record. The moving party prepares his statement, and submits it to the opposite party. If satisfactory to him, they add a certificate, which they sign, that it is correct and agreed to by them. If not, he proposes amendments, and submits them to the moving party; and if they are accepted by him, the statement is engrossed accordingly, and to the engrossed party a certificate is added and signed by them, to the effect that the statement is correct and agreed to by them; if they cannot agree, the statement and proposed amendments are submitted to the judge, who allows or disallows, according to the circumstances. After the judge has thus determined what shall constitute the statement, it is engrossed accordingly, and a certificate added that it is correct, and, if not signed by counsel, must be signed by the judge. Nothing can be regarded by us as a statement which is not authenticated in one of these modes. There is nothing, therefore, in the record in this case to which we can look, except the judgment roll, upon which no errors are assigned."

We might observe by the way, that the judgment below seems to have been correct. There was certainly no abuse of discretion in the judge setting aside the default upon condition that defendant go to trial without delay. We think there can be no doubt but defendant's property was a "mill or manufactury," within the intent and meaning of the statute concerning mechanics' liens. Neither do we think there was any abuse of discretion in denying defendant's application for a continuance.

It would be useless, however, to consider these questions further, as, for the reasons stated, the appeal will be dismissed. It is so ordered.

Barnes, J., concurring.

PORTER, J.—I cannot agree with the court upon the question of refusal to grant the continuance. In *Solomon* v. *Norton*, 2 Ariz. 100, 11 Pac. 108, I had occasion to dissent, "for the reason that defendants did not have a fair chance for the presentation of their case to the court; that there was an abuse of discretion in the district judge in not granting the continuance." In the case at bar, though the default was set aside, it was of no avail to the defendant, as shown by the affidavit. I think defendant showed sufficient grounds for a continuance, and that there was error in not granting it.

[Civil No. 197. Filed January 17, 1888.]

[S. C. 16 Pac. 266.]

JOHN HILL, et al., Plaintiffs and Respondents, v. E. LENORMAND, et al., Defendants and Appellants.

1. FINDINGS—RESPONSIVE TO ISSUE—EQUITY—MAY GRANT LESS RELIEF THAN PRAYED IN COMPLAINT.—Findings that the amount of water appropriated was less than that claimed in the complaint are responsive to the issue raised by a denial of the allegation of appropriation. A court of equity is not bound by the exact measure of the relief asked, and may grant less in accordance with the proof.

2. WATER AND WATER COURSES—RIPARIAN RIGHTS—APPROPRIATION—VESTED RIGHTS—OWNERSHIP OF LAND IMMATERIAL TO RIGHT OF APPROPRIATION.—Riparian rights are the same in Arizona as elsewhere, wherever they apply, but they are subject to intervening rights of prior appropriators, who acquire vested rights in waters. It is immaterial whether or not plaintiffs owned their land at the time their appropriation was initiated.

3. §§ 2339-2340 REV. ST. U. S. 1878 CITED AND CONSTRUED.

APPEAL from a Judgment of the County Court in and for the County of Cochise. Webster Street, Judge. Affirmed.

The facts are stated in the opinion.

Herring & Herring, for Appellants.

Goodrich & Smith, for Respondents.

There is no statement of facts and hence the only question that can possibly arise upon the record as it made before this court is: Do the findings of fact support the decree of the court below? Every presumption is in favor of the findings and of the correctness of the judgment. *Kilborn* v. *Ritchie,* 2 Cal. 145, 56 Am. Dec. 326; *Shelby* v. *Houston,* 38 Cal. 421.

To reverse appellants must show affirmatively that the decree violates some rule of law. *Johnson* v. *Pendleton,* 1 Cal. 133.

WRIGHT, C. J.—This action was instituted in the county court of Cochise county, and its object was equitable relief. The complaint alleges that plaintiffs and their predecessors in interest, in the year 1877, appropriated the waters of the San Pedro river, to the extent of a canal or ditch six feet wide at the bottom, and of the depth of three feet; that plaintiff, the Contention Consolidated Mining Company, purchased from the predecessors of these plaintiffs an interest in said ditch, and the water thus appropriated. The court found as a fact that the appropriation was made at the time alleged; but that the amount of water appropriated was what would pass, without pressure, through a ditch five feet wide at the bottom, and of the depth of eighteen inches. The defendants, by their learned counsel, object to this finding, claiming that it is not responsive to the issue raised by their denial of the allegations; but we think it is. True, it finds, from the evidence, that the amount of water appropriated by plaintiffs was less than alleged; but, certainly, the finding was in direct line of the issue, and responsive to it. That the court found the amount of water appropriated by plaintiffs to be less than alleged in the complaint did not hurt defendants. It is well settled that courts of equity are not bound by the exact measure of relief asked. The logical inference to be drawn from the position of defendants' learned counsel is that, because plaintiffs allege that they had appropriated an amount of water that could pass through a ditch or canal

six feet wide at the bottom by three feet deep, which allegation was denied by defendants, therefor the court should have found for the defendants, if the proofs showed that plaintiffs were not entitled to all they claimed. If A. brings suit against B., in trover, for the conversion of a bushel of barley, and B. denies the conversion, and, at the trial, the proofs show the conversion by B, of only one-half bushel, would not a judgment for A. for the one-half bushel be responsive to the issue?

It is admitted that plaintiffs made their appropriation in 1877; and that subsequently, in 1884, defendants diverted a considerable quantity of the waters of San Pedro river into a ditch constructed by them; and the court found as a fact that such diversion affected the flow of water into plaintiffs' ditch. We cannot review the finding of that fact here.

Now the only statement of facts in the transcript is the evidence of the defendant Lenormand, to the effect that he is the owner of the lands which he irrigates and that these lands lie on both sides of the San Pedro river. And this brings us to a consideration of the real question in this case. Defendants, by their learned counsel, requested the following findings of law: "That defendants are riparian owners of the waters of the San Pedro river, where said river runs along through the lands and premises of defendants. (2) That defendants, as riparian owners of the waters of San Pedro river, where said river runs along or through their lands, are entitled to such free and full use of said waters as is reasonably necessary and sufficient for the purpose of cultivating their lands, and for such domestic purposes as are incident to the care of their stock, and the affairs of their daily household." These requests the court refused, and the defendants insist that it was error; but we think it was not. Does the fact of the ownership of these lands, on both sides of San Pedro river, by the defendants, give them the right to the usufruct of the waters as riparian owners, and that, too, notwithstanding the prior appropriation thereof by plaintiffs. Under the common law, it would; under the law as settled on the Pacific coast, it would not. This law is not only settled here by the adjudications of the courts, by the

long-established customs of the country, but it is ratified and confirmed by the legislation of congress. We deem no doctrine more clearly and thoroughly settled on this coast than this doctrine of water-rights. It is *par excellence* the *doctrine* of the Pacific coast. Among the earliest apprehensions of the people was the paramount importance of water. Among the miners the custom early grew of according to him the best right who was first in time. The privilege of irrigation soon became gauged by the same rule; so that now this doctrine is thoroughly interwoven into the jurisprudence of the coast, and may not be questioned. Riparian rights are the same here as elsewhere, wherever they apply; but they do not apply where the rights of prior appropriators have intervened. As is very generally the case in the Pacific states and territories, the conditions are so changed that riparian rights do not attach. In the case at bar, riparian rights do not apply. Here, the defendants, six or seven years subsequent to the appropriation of plaintiffs, bought the lands about two miles above plaintiffs, on both sides of the San Pedro river, and sought the usufruct of the waters thereof; diverting the same by means of a dam, ditch, etc., thereby interfering with the vested rights of plaintiffs as prior appropriators. Plaintiffs, as prior appropriators, had acquired vested rights in these waters, and the purchase and ownership of the lands on both sides of San Pedro river above plaintiffs did not divest these rights. Mr. Gould, in his admirable work on Waters, (section 228,) says: "In California, Nevada, and other Pacific states and territories, the common-law rule upon this subject has been modified, owing to the peculiar condition of the settlers and miners upon the public lands; and the right to running water exists without private ownership of the soil, upon the ground of prior location upon the land, or prior appropriation of the water." So that, as we take it, it was wholly immaterial whether plaintiffs owned their lands at the time of the appropriation or not. The federal government by act of congress, July 26, 1866, (see section 2339, Rev. St. U. S.,) confirmed all rights to the use of water acquired by prior appropriation; and by the act of congress

of July 9, 1870, it is provided that all patents granted, or preemptions or homesteads allowed, shall be subject to any vested or accrued water-rights, etc., acquired under the ninth section of the said act of July 26, 1866. These federal statutes have been repeatedly construed by the courts of last resort on the Pacific coast, and we believe uniformly in harmony with the views expressed herein, unless it was in *Van Sickle* v. *Haines*, 7 Nev. 286, which was expressly overruled by the later case of *Jones v. Adams*. See *Jones* v. *Adams*, 19 Nev. 78, 3 Am. St. Rep. 788, 6 Pac. 442; *Kaylor* v. *Campbell*, 13 Or. 596, 11 Pac. 301; *Farley* v. *Irrigating Co.*, 58 Cal. 142; *Basey* v. *Gallagher*, 20 Wall. 683; *Jennison* v. *Kirk*, 98 U. S. 453; *Lux* v. *Haggin*, 4 Pac. (Cal.) 929, and cases there cited.

The court found that the quantity of water appropriated by plaintiffs (as hereinbefore indicated) was, for long times continuous, necessary for their reduction-works, and for irrigating their lands; and thereupon enjoined defendants from interfering with said quantity of water at times when the same was necessary for plaintiffs' use as aforesaid.

We think the judgment of the county court ought to be affirmed, and it is so ordered.

[Filed February 6, 1888.]

[S. C. 16 Pac. 434.]

CAMERON H. KING, Petitioner, v. JOHN J. HAWKINS, Auditor, Respondent.

1. PUBLIC OFFICERS—ASSIGNMENT OF UNEARNED SALARY.—An attempted assignment by a public official of his unearned salary is void as against public policy.

2. POWER OF ATTORNEY—AUTHORITY TO RECEIPT FOR WARRANT—CANNOT BE ASSIGNED.—An instrument in the nature of a power of attorney authorizing a certain party to receipt for warrant cannot be assigned. *Quaere*: If it contained words of negotiability would it be transferable?

3. PUBLIC OFFICERS — EARNED SALARIES — PROTECTION OF AUDITOR.—

As a matter of public policy assignments of officials' *earned* salaries ought to be regarded as void, especially for the protection of auditing officers, who should only be compelled to draw his warrant to the officer named in the statute.

Petition for alternative writ of mandamus. Granted.

The facts are stated in the opinion.

Cameron H. King, in persona, for petitioner.

Wilson and Norris, for respondent.

WRIGHT, C. J.—The petitioner, Cameron H. King, is the commissioner of immigration of this territory. As such, he is entitled to a salary of $2,000 per year. The defendant, in his answer and response, sets up a contract entered into by the petitioner and one Thomas E. Farish, prior to the thirty-first day of December, 1887,—the time when said petitioner's last quarterly salary accrued,—by which, for a valuable consideration, said petitioner, King, sold and assigned said quarterly salary to the said Farish. The exhibits filed with said answer and response do not show any assignment by King to Farish; but the following paper was filed therewith:

"Phœnix, Arizona, December 31, 1887.

"*Territory of Arizona to Cameron H. King, Dr.*

"For salary as commissioner of immigration for the quarter ending December 31, 1887, $500.00.

"Received payment. Cameron H. King.

"*Territorial Auditor:* Please draw warrant for above in favor of E. H. Hiller, who is authorized to receipt for me.

Cameron H. King."

On the back of this instrument are the words: "Without recourse. E. H. Hiller."

It is to be observed that the above order upon the auditor directs him to draw his warrant for the quarterly salary due King, in favor of E. H. Hiller, and no one else. It is in the nature of a power of attorney to the said Hiller, authorizing him to receipt for the warrant. This power was

perhaps revocable by King at any time before the rights of third parties intervened. It is fundamental that an instrument such as this must have negotiable words on its face, in order to make it susceptible of transfer. If it wants these negotiable words, it cannot be negotiated or transferred so as to enable the assignee to sue upon it in his own name. It was a delegation of power to Hiller, without authority to Hiller to empower another to act for him. Would a general draft upon the auditor to draw his warrant for the salary in favor of E. H. Hiller or order have been negotiable? It is certain that such a draft, drawn against a contingent public fund, is not negotiable. There are no words upon the face of this instrument which show that it was the intention to give it an assignable or transferable quality.

The main question, however, in this case, and the one absolutely fatal to the defendant's side, is that the contract set up in the answer and response is void, as against public policy. In the answer and response is the following language: "Defendant, further responding, says that he is informed and believes, and therefore charges the fact to be, that said order, account, and receipt of payment of same was by said King executed and delivered by him to said Thomas E. Farish in payment of consideration arising out of contract in favor of said Farish for the amount of $500; said contract having been entered into by and between said King and said Farish *prior* thereto." The truth is plainly inferable from the record herein that the commissioner of immigration, prior to the thirty-first of December, 1887—the time when his quarterly salary in question accrued,—attempted, by way of anticipation, the assignment of said salary, before it was due, first to E. H. Hiller, and afterwards, as it is claimed, to Thomas E. Farish. We entertain no doubt that both attempted assignments were void, as against a well-established rule of public policy. With the private equities and *bona fides* between the parties, of course, we have nothing to do. The paramount object of good government is to secure efficiency in the public service; and a good government will do its part whether the officer does his or not. To this end, those

engaged in its public service are protected to the extent that the funds designed and set apart to compensate for the public service are not amenable to the ordinary laws of business. They cannot be taken on execution or attachment; nor will the officer, by any act of his, be permitted to make them available to strangers. The ground of the rule is the necessity of securing the efficiency of the public service, and it proceeds upon the philosophic theory that a public officer will be all the better prompted to a faithful discharge of duty when that duty is coupled with a material interest. Mr. Justice Johnson, in *Bliss* v. *Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273, lays down the rule very clearly, as follows: "It is true that, in respect to officers removable at will, this evil could in some measure be limited by their removal when they were found assigning their salaries; but this is only a partial remedy, for there would still be no means of preventing a recurrence of the same difficulty. If such assignments are allowed, then the assignees, by notice to the government, would on ordinary principles be entitled to receive pay directly, and to take the place of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the public service." The welfare of society, good morals, the public conscience, good government, all require that the public service be efficient, clean, and untainted; hence the sound policy of the law is to remove every obstacle, the slightest hinderance, in the pathway of a public officer's scrupulous and faithful discharge of duty.

Now, we are aware that in *Bank* v. *Hastings*, 15 Wis. 78, different views are expressed from those herein; but that case seems to stand alone. The court there justifies its dissent from the current opinion in England on this subject on the ground that the condition of things in the one country has no application to the condition of things in the other. It is not perceived, however, why the efficiency of the public service is not as essential, and the reasons just as strong, in support

of a public policy which prohibits trafficking in the unearned salaries of public officers in this country as in that. The case of *Bank* v. *Hastings* was expressly disapproved in the leading case of *Bliss* v. *Lawrence*, already cited, (see *supra*,) and was also disapproved in *Bangs* v. *Dunn*, 66 Cal. 72, 4 Pac. Rep. 963. We much incline to the opinion that, in a large measure, the same reasons which make the assignment of public officers' unearned salaries void, as against public policy, ought to apply to the assignment of such officers' *earned* salaries; and this, especially, for the protection of the auditing officer. Suppose, as in the case at bar, A., a public officer, assigns his salary, first to B., then to C., and finally comes in and claims the warrant himself, and asks a mandate that the auditor draw and deliver the warrant to him. In the mean time, the auditor has drawn his warrant to the second assignee, not knowing but what he was the first. Has not the officer come uncomfortably near incurring personal liability? It would be a safe and sound policy which would compel the auditor to draw his warrant only to the public officer named in the statute. The auditor would then be free from doubt, and could act with safety.

As the record shows the warrant has already been drawn in favor of the petitioner, it is ordered that a mandate issue to the auditor, the defendant herein, that he deliver said warrant to the petitioner, Cameron H. King.

Barnes, J., concurs. Porter, J., concurs in decision.

[Civil No. 189. Filed February 17, 1888.]

[S. C. 16 Pac. 565.]

ALTA MINING AND SMELTING COMPANY, Plaintiff and Appellee, v. THE BENSON MINING AND SMELTING COMPANY, Defendant and Appellant.

1. MINES AND MINING—WRONGFUL CONVERSION OF ORE—MEASURE OF DAMAGES.—Just compensation is the rule of damage generally ap-

plicable in cases of trover and conversion, and in an action for damages for conversion of ores the value of the ore when broken down at the mine, making no allowance for the labor expended in mining, is a proper measure of damage.

2. ESTOPPEL—PARTY ASSERTING IN FAULT.—Where the party asserting an estoppel is guilty of a wrongful and deliberate infraction of the rights of the other party it should not be permitted to shield itself behind the doctrine.

3. MINES AND MINING—APPLICATION FOR PATENT BECOMES PRIVATE PROPERTY—NECESSITY FOR ANNUAL ASSESSMENT WORK.—After the entry of a mining claim for patent and the issuance of the certificate of purchase the land covered thereby becomes private property, the contract of purchase being complete when the certificate of entry was executed and delivered, and thereafter annual assessment work is unnecessary.

AFFIRMED. 145 U. S. 428; 36 LAW ED. 762, 12 Sup. Ct. Rep. 877.

APPEAL from a Judgment of the District Court of the First Judicial District in and for the County of Pima. Wm. H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

C. C. Stephens, (Geo. G. Berry, of counsel,) for Appellant.

Haynes & Styles, and J. A. Anderson, for Appellee.

WRIGHT, C. J.—This case was tried at the March term, 1886, of the district court of Pima county, before the court sitting as a jury. The suit was brought by the appellee in February, 1885, to recover for the value of certain ore, which it alleged had been taken from the Alta mine in the Harshaw mining district, in Pima county, and converted by appellant to its own use. From the record it appears that Fagan, Harshaw and others owned the Alta mine prior and up to September, 1879; that about that time they made regular entry and payment for the same, in the proper local United States land-office and got a certificate of purchase, and then sold and conveyed the mine to appellee. In the usual course of

the administration of affairs at the land-office at Washington, a patent was issued in January, 1884. Appellant is a corporation organized under the laws of California. Appellee is a corporation organized under the laws of New York. After its purchase, the appellee took possession, and worked the mine extensively up to 1882; in that year it did but little work upon the mine,—less than $100 worth. On the first of January of the following year, J. M. Luttrell, possibly in the honest belief that, by reason that $100 worth of work was not done in 1882, the Alta mine was subject to relocation as forfeited mineral land, attempted the relocation of it, under the name of "Ben Butler Mine." Under this pretense only, as the record shows, Luttrell took possession of the mine, and, early in the summer of 1883, took from it about 19 tons of ore, which appellant bought and reduced to bullion at its smelter. In the latter part of the summer of 1883, Luttrell made a contract with H. H. Scott, by which Scott was to furnish machinery, money, etc., for the further working of the mine, for one-half the net profits. Now, Scott was a brother-in-law of Salisbury, the president and manager of the appellant, the Benson Mining & Smelting Company, and was sent to Luttrell in the interest of appellant, as explained by Salisbury himself. The machinery and means which Scott was to furnish were furnished by appellant; it paid the wage-workers; furnished the pay-rolls,—in short, the fact is clearly deducible from the record, that Scott was a mere nominal party to this contract, the appellant being the actual party. Under this contract something like 167½ tons of ore were taken out of the Alta mine, and were sent to and reduced by the smelting works of appellant. The Court found for the plaintiff and appellee, for the value of the ore when broken down at the mine,—when it first became a chattel,—estimating the same at $20 per ton; thus allowing for the cost of transportation to appellant's smelting-works, and the cost of reduction, but making no allowance for the labor expended in the mining of the ore,—that is, in converting it from realty into chattels.

Has the appellant been wronged by this judgment? Did

the measure of damages fixed by the court mete to it an injustice? If the evidence in the case supports the ninth and tenth findings of the court, or if the evidence conflicts, even though it much preponderates against those findings, the answer to these questions must be in the negative. It is unnecessary to cite a single authority as to the plain and well-defined power and established duty of appellate courts, when the evidence is conflicting or tends to support the verdict or finding, or is even against the weight of evidence at *nisi prius*. The said ninth and tenth findings of the court below are as follows: "(9) That the said entries and trespasses of said Luttrell and Scott, upon said Alta mine, were each and all with the knowledge of plaintiff's ownership thereof. (10) The defendant, at the time it received said ores, had knowledge that they came from said Alta mine, and that they were the property of plaintiff." We think the evidence justified these findings. Luttrell himself testified that he had known the Alta mine since as far back as 1879, and that he knew that Fagan, Harshaw and others, the grantors of appellee, were the owners of it at that time. He also testified that he knew about the time when the mine was sold to the appellee, and that he knew, as early as 1880, that plaintiff and appellee's grantors had entered the mine in the United States land-office, and had made application for a patent thereto, at a cost of some $800. Thus he had ample information to put him on his guard lest he invade the rights of others; to impart notice to him,—such notice as, of itself, imputes knowledge. Ignorance of the law is no excuse for its infraction; and therefore Luttrell's not knowing that assessment work did not have to be done by the appellee was no justification of his trespass. The evidence further shows that in October, 1883, when Luttrell was in Tombstone to procure medical attendance for a physical injury, Salisbury and Scott told him they had taken steps to prevent a patent to the Alta mine being issued by the government. Salisbury was the president and chief owner of appellant, the Benson Mining & Smelting Company; his knowledge, therefore, was the knowledge of appellant; and here it is revealed that he

had absolute knowledge that the Alta mine had been entered and an application made for a patent; for he had employed a lawyer at Washington and taken steps to prevent the issuance of the patent. Subsequent to the time when appellant took these steps to prevent the issuance of the patent, the bulk of the ore, as shown by the evidence, was taken from the Alta mine, and reduced by appellant at its reduction works. Mr. Salisbury himself testified: "There had always been some talk about a conflicting claim, because it was a mine located by Luttrell on account of assessment work not being done. That was the reason I investigated the title." If he was not an interested party, why did he investigate the title? If he had no knowledge of the *status* of affairs, why did *he* employ a lawyer at Washington, and take steps to prevent the issuance of a patent? We think the evidence amply justified the findings, and that appellant was fortunate in having so reasonable a measure meted out to it. It was immaterial, however, whether appellant knew, at the time it converted the ore, that it belonged to appellee or not. If Luttrell and Scott were guilty of a willful wrong, appellant would be liable to the same rule of damages as would be applicable to them; and this, though it bought the ore without notice or knowledge that it belonged to the Alta Mining & Smelting Company, the appellee.

Just compensation is the rule of damage generally applicable in cases of trover and conversion, and is the one which the learned judge who tried this case seems to have applied. A more stringent rule would probably have furnished the appellant no just cause of complaint. In the celebrated *Wooden-Ware Case,* decided by the United States supreme court, in 106 U. S. 432, 1 Sup. Ct. Rep. 398, Mr. Justice Miller, in rendering the opinion of the court, quotes approvingly Lord Hatherley, in the house of lords, in *Livingstone* v. *Coal Co.,* 5 App. Cas. 25. In that case Lord Hatherley says: "There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and, because it is under ground, is, probably, for some little time not detected, the court of equity in this country will struggle, or,

I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect to what he has done, as would have been justly made to him if the parties had been working by agreement." We entertain no doubt whatever that the rule of damages applied by the trial court in this case was eminently just to appellant. See *Wooden-Ware Co.* v. *U. S.* 106 U. S. 432, 1 Sup. Ct. Rep. 398; *Winchester* v. *Craig,* 32 Mich. 205, 61 Am. Dec. 239; *Greeley* v. *Stilson,* 27 Mich. 154; *Moody* v. *Whitney,* 38 Me. 174; *Maye* v. *Yappan,* 23 Cal. 306; *Barton Coal Co.* v. *Cox,* 39 Md. 1, 17 Am. Dec. 525, and the very able review of the cases found therein.

The learned counsel for appellant relies upon the doctrine of estoppel in this case, and has invoked the wholesome paraphrase that "where one has been silent when conscience required that he should have spoken, he shall not be heard to speak, when conscience requires that he should be silent." We do not think that the doctrine of estoppel should apply in this case. The appellee was not silent when it should have spoken. After Luttrell and Scott had furtively worked the appellee's mine a few months, it, or rather its grantors, the government, spoke so loud in the issuance of its patent that appellant suddenly decamped, removing its machinery, etc., in the night, notwithstanding it had employed counsel in Washington, and had taken steps to prevent the issuing of the patent. The doctrine of *estoppel in pais* is closely allied that old equitable rule that no one shall take advantage of its own wrong. The court below found, and we think rightly so, from the evidence, that the possession of Luttrell and Scott was wrongful; that the taking out of the ore by them was wrongful, and that the conversion of the ore by appellant was wrongful. Appellant ought not now to be permitted to shield itself behind the doctrine of equitable estoppel *in pais* and have thereby flow to it an advantage from its wrongful and deliberate infraction of its neighbor's rights. Besides there is no evidence that appellee knew anything about the

furtive operations of Luttrell and Scott, or the appellant, until after those operations had ceased in December, 1883.

But the question upon which the learned counsel insists with greatest stress is that Luttrell had the right to relocate the mine on January 1, 1883, because the assessment work had not been done in 1882; that, notwithstanding appellee's grantors had made regular entry of and application for a patent to the mine, the assessment work had to be done until the patent issued. This position, although maintained with all the force of ingenious and subtile reasoning, is, we think, untenable. The law has been settled the other way. When the entry was made, and the certificate of purchase was given, the land covering this mine became segregated from the mass of public lands, and was thenceforth private property, the contract of purchase being complete when the certificate of entry was executed and delivered. The government, subsequently to this time, held the naked legal fee, until the patent was actually issued, in trust for the purchaser, who had by that entry and certificate become the equitable owner; and the land thereafter ceased to be a part of the public domain. The property thus acquired thereafter became subject to territorial taxation. The ownership of the property was changed as soon as the entry was made according to the terms and in the manner prescribed by law. The patent, when issued by operation of law, related back to the date of the original entry. Now, the logic of the learned counsel for appellant, to be consistent, must be that the effect of a failure to do the assessment work on a mine,—to the owner of which no patent has yet issued, although entry has been made and certificate been given,—is to throw such mineral land back into the public domain, or rather, perhaps that it has never become segregated from that domain; and that, therefore, if the assessment work has not been done in any year up to the issuing of the patent, the mine becomes subject to relocation. Counsel admits that in regard to agricultural lands the party making entry and getting the certificate becomes the equitable owner from the date of such entry, the government being a mere naked trus-

tee of the legal title; but contend that as to the mineral lands it is different,—that the great purpose of the government and of the legislation of congress has been to develop the mineral resources of the country. This is true; but has not one of the great purposes of the government and of the legislation of congress been to develop the *agricultural* resources of the country also? And is there any good reason why the same rules of law should not govern, and the same legal principles apply, in the conveyance by the government of the one class of lands that govern and apply in its conveyance of the other? True, different regulations as to the price per acre, number of acres, etc., have been made as to the two classes of lands. Some of the preliminary steps entitling one to make entry in the one class are different from those entitling him to make entry in the other: but when legal entry has been made, and a certificate of purchase issued in either class, is not the equitable title which follows in the one as absolute as that which follows in the other? Why should it not be? There is no difference. The supreme court of the United States, in repeated decisions, has put the matter beyond cavil. In *Deffeback* v. *Hawke,* 115 U. S. 405, 6 Sup. Ct. Rep. 95, Mr. Justice Field, in delivering the opinion of the court, said, "On the twentieth day of November, 1877, the plaintiff applied to the United States land-office at Deadwood to enter the land as a placer mining claim, and on the thirty-first of January, 1878, entered it as such, by paying the government price therefor. No adverse claim was ever filed with the register and receiver of the local land-office, and the entry was never canceled nor disapproved by the officers of the land department at Washington. The right of the government therefore passed to him, and though its deed, that is, its patent, was not issued to him "till January 31, 1882, the certificate of purchase which was given to him upon the entry was, so far as the acquisition of title by any other party was concerned, equivalent to a patent." It must be borne in mind that this case, like the one at bar, involved the title to mineral land. Now it will not be pretended that, if the Alta Mining & Smelting

Company had had a patent, instead of a certificate of purchase, at the date of said certificate, no assessment work would have been necessary. If it be true that upon making the entry and obtaining a certificate of purchase an equitable title accrued to plaintiff, and the land entered became the private property of plaintiff, and ceased to be a part of the public domain, why was there any greater necessity that assessment work should be done in the one case than in the other? The plaintiff had bought and paid for that much mineral land, and had obtained the government's certificate of purchase. The purpose of the government, as to that part of the public domain, was thereby fully subserved. It became a matter immaterial to the government whether assessment work was done or not; as much so as to whether a farmer who had acquired equitable title to agricultural land by entry and certificate of purchase should put his fields in barley or rye, or should not cultivate them at all.

Pending the entry, no adverse claim was filed in the local land-office at Pima county, nor was the entry ever canceled or set aside in the land department at Washington. The Alta mine was, then, not subject to relocation on January 1, 1883, when J. M. Luttrell attempted to relocate it, and took possession thereof. It had ceased to be a part of the public domain. This Luttrell knew, or should have known. He was a mere trespasser, without even color of title; for, as the supreme court of the United States says in *Deffeback* v. *Hawke, supra:* "There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law purporting to transfer to him the title, or to give him the right of possession. And there can be no such thing as good faith in an adverse holding when the party knows he has no title, and that, under the law, which he is presumed to know, he can acquire none by his occupation." Brave words, these, but plump with the flesh of truth. This is the deliberate adjudication of our great tribunal of final resort. From this central judicial oracle come those decrees which constitute the highest law of the land. Luttrell is presumed to have known the law. He is presumed to have known that

appellee's grantors had entered the Alta mine in the United States land-office; had paid the purchase money for the same, and had gotten a certificate from the government to that effect; that, under the law, on January 1, 1883, when he attempted to relocate the mine, no assessment work had to be done upon it, for it had ceased to be a part of the public domain, and therefore was not subject to relocation; and that, under the law, "there can be no such thing as an adverse holding where the party knows he has no title," and no such thing as good faith in such holding. Certainly, if the mine was not subject to location, he could gain no title by attempting to locate it. All this Scott and the appellant, through Salisbury, its president and manager, knew, or should have known,—are presumed to have known,—and must be held responsible for not knowing. See *Deffeback* v. *Hawke*, 115 U. S. 392, 6 Sup. St. Rep. 95; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Carroll* v. *Safford*, 3 How. 441; *Courchaine* v. *Bullion Mining Co.*, 4 Nev. 369; *Kahn* v. *Telegraph Co.*, 2 Utah, 174; *Stark* v. *Starrs*, 6 Wall. 418.

We are inclined to the belief that this was willful, deliberate, and intelligent trespass. At all events, we are certain no injustice has been done to appellant. The judgment is therefore affirmed.

Porter, J., concurred in the decision.

[Civil No. 222. Filed February 20, 1888.]

[S. C. 17 Pac. 453.]

A. S. CLOUGH, Plaintiff and Appellant, v. JAMES E. WING, Defendant and Appellee.

1. EQUITY—JURY—VERDICT—ADVISORY.—Upon an issue out of chancery the verdict of a jury can be only advisory.

2. IRRIGATION—INJUNCTION TO RESTRAIN DIVERSION—DENIED WHERE NO INJURY SHOWN—WATER SUFFICIENT FOR BOTH PARTIES.—

Where the evidence shows that at all times there was sufficient water for the lands of both parties, plaintiff has no right to injunction restraining defendant from diversion and use of water.

3. SAME—APPROPRIATION—BENEFICIAL USE MEASURE OF RIGHT—REASONABLE USE—SUBSEQUENT APPROPRIATORS.—An appropriator of water for irrigation is entitled to so much water only as is necessary to irrigate his land, and is bound to make a reasonable use of it. Subsequent appropriators rights to the residue of the stream or to the whole thereof at times the water is not needed by prior appropriators complete.

4. SAME—COMMON LAW—RIPARIAN RIGHTS DO NOT EXIST—USE OF WATER FOR IRRIGATION—REV. ST. U. S. 1878, SEC. 2339-2340; COMP. LAWS ARIZ. 1877, par. 3240-42-43 CITED—COMMON LAW INAPPLICABLE TO RIGHT TO USE OF WATER.—The riparian rights of the common law do not exist in this territory. All right in water in non-navigable streams in Arizona is subservient to use in tilling the soil. This principle is recognized by Acts of Congress, *supra*, and by the legislature in par. 3240-42-43. The Territory of Arizona was formerly subject to the laws of Mexico and the common law was unknown; and that law so far as applicable to the uses of water is not suited to the conditions that exist here.

5. SAME—EVIDENCE—LOCAL CUSTOMS—JUDICIAL KNOWLEDGE.—"Local customs" in reference to the use of water do not require proof. The courts take knowledge of them as of the public laws.

6. SAME—APPROPRIATION—DEFINED.—What constitutes an appropriation is largely a question of fact. Appropriation is the intent to take, accompanied by some open, physical demonstration of the intent and for some valuable use.

APPEAL from the District Court of the Third Judicial District in and for the County of Yavapai. J. C. Shields, Judge. Affirmed.

The facts are stated in the opinion.

John A. Rush and E. W. Wells, for Appellants.

Plaintiff claims right to the use of so much of the waters of Granite creek as is necessary to irrigate his premises described in his complaint, by virtue of prior appropriation of such waters by himself and grantors, and bases this right

upon the act of Congress of July, 1886, and the custom, judicial decisions and laws of the Territory of Arizona. Rev. St. U. S., secs. 2338, 2339 and 2340; *Kaler* v. *Campbell,* 13 Or. 596, 11 Pac. 301.

The learned judge who rendered the decision and judgment in the court below seemed to question whether the act of Congress was intended to cover water rights acquired after its passage, or was confined in its effect alone to vested water rights existing at the time of its passage.

There can be no doubt upon this question. The act controls and governs water rights acquired since, as well as before its passage. The doctrine of riparian right, as fixed by the common law, was based upon the theory that the water flowing in a stream running through or adjoining the land was incident thereto, and that a conveyance of the land carried with it the incident, but this theory can have no controlling effect in this case. The government is primarily the owner of the land and the user of the water, and as such owner can unquestionably separate the land and the uses of the water, if it so chooses. It may grant the land to one and the use of the water to another.

Water rights acquired subsequent to the act of Congress are controlled and affected by it. *Kaler* v. *Campbell,* 13 Or. 596, 11 Pac. Rep. 301; *Osgood* v. *Eldorado M. Co.,* 56 Cal. 571; *Farley* v. *Spring Valley M. Co.,* 58 Cal. 142; *Jones* v. *Adams,* 19 Nev. 78, 6 Pac. 442; *Broder* v. *Water Co.,* 101 U. S. 274; *Basey* v. *Gallagher,* 20 Wall. 670.

As to the effect of act of Congress upon riparian right, see *Barnes* v. *Sabron,* 10 Nev. 233-238; *Kaler* v. *Campbell, supra; Judkins* v. *Elliott,* (Cal.) 12 Pac. 116.

Where the right of prior appropriation of water is founded either upon custom, the decisions of courts or the law of the state or territory, it is sufficient to bring it within the purview of the act of Congress. It is not necessary that all three of the conditions exist in any one case. *Basey* v. *Gallagher,* 20 Wall. 670.

The right to prior appropriation of water is established

in principle by the laws of the Territory. Secs. 1, 3, 7, 17, pp. 538, 539, Comp. Laws; Article 22, Bill of Rights.

The point of diversion of water from a flowing stream may be changed at any time after appropriation if the change does not conflict with existing rights of others. *Kidd* v. *Laird,* 15 Cal. 179, 79 Am. Dec. 472; *Junkans* v. *Bergen,* 67 Cal. 270, 7 Pac. 684.

The measure of the water appropriated is the capacity of the ditches and flumes of the appropriator if no other measure be fixed, such as so many inches of water, provided all the water the ditches and flumes will carry be necessary for the purposes it was appropriated. *Barnes* v. *Sabron,* 10 Nev. 245.

The appropriation of water is not limited to the amount actually used the first year. The appropriator may not be able to reduce to cultivation the land for which the water was appropriated the first year. Until the whole of the land for which the water was originally appropriated is reduced to cultivation, so long as he uses reasonable diligence in fitting his land for the use of the water, the law protects him in the right. *Barnes* v. *Sabron, supra.*

The issues found by the jury were in favor of the plaintiff, and were in accordance with, and supported by, the evidence. Upon this verdict plaintiff was entitled to judgment and decree, as prayed for in his complaint. But the learned judge claimed that the verdict was merely advisory, and concluded to disregard it and decide the case independent of and contrary to it. We admit that in an equity case the Court, in its discretion, may treat the verdict of a jury as advisory, and wholly disregard it, but when the issues found by the jury are conclusive of the rights of the parties, and the verdict is in accordance with the weight of the evidence, then for the court to disregard the verdict and render judgment contrary thereto, is an arbitrary exercise of that judgment which this court should correct.

The Court below finds that the plaintiff stood by and saw Wing build his ditches for the purpose of taking the water, and made no objection, and is therefore estopped from dis-

puting defendant's claim to the water. Bearing in mind that defendant built his ditches, in 1884, when there was an excess of water; that during each year there was more water than plaintiff needed, except during the dry season, to-wit: the months of May, June and July of each year; that plaintiff had no claim or right to this surplus, plaintiff is not estopped from disputing defendant's claim to water covered by plaintiff's prior appropriation. *Anaheim Water Co.* v. *Semi Tropic Water Co.,* 64 Cal. 195, 30 Pac. 623; *Dorlarque* v. *Cress,* 71 Ill. 380; *Weise* v. *Moore,* 22 Mo. App. 537-8; *Alexander* v. *Kerr,* 2 Rawle (Pa.) 83, 19 Am. Dec. 169.

Herndon and Hawkins, for Appellee.

This is an equitable proceeding. The verdict of the jury in such a case is merely advisory to the court, and is not conclusive, but may be disregarded by the Chancellor. *Basey* v. *Gallagher,* 20 Wall. 681.

The Court found that before defendant built any ditches or flumes, or went to any expense, plaintiff told defendant there was a surplus of water over and above what he needed; that to this surplus plaintiff had no claim, and that defendant might use it; that shortly after this talk defendant began the construction of his ditches; that the plaintiff took no steps to stop the defendant, but stood by and watched the defendant use the water for a period without complaint.

The plaintiff is estopped from questioning the legality of the act he then sanctioned, to the prejudice of defendant, who had given faith to his words, and to the fair inference to be drawn from his conduct. *Dalton* v. *Rentaria,* 2 Ariz. 275, 15 Pac. 37-42; *Dickerson* v. *Colgrove,* 100 U. S. 578; *Kirk* v. *Hamilton,* 102 U. S. 68.

The right to appropriate water is subject to two conditions, (1) That the appropriation must be for some useful purpose. (2) That economy and care must be employed in the use thereof. *Weaver* v. *Eureka Lake Co.,* 15 Cal. 271; *Basey* v. *Gallagher,* 20 Wall. 681; *Davis* v. *Gale,* 32 Cal. 26, 91 Am. Dec. 554.

As to whether the use of the water by Clough was econom-

ical and careful, and as to whether his ditches, flumes and dams were so constructed as to save the water, there was a conflict of evidence, and where such a substantial conflict exists in the evidence, this court will not disturb the findings and decisions of the Chancellor unless gross injustice has been done. *Gammans* v. *Rousel,* 14 Nev. 171; *Barnes* v. *Sabron,* 10 Nev. 243.

When the rights of subsequent appropriators attach, the prior appropriator cannot encroach thereon by extending his rights beyond his first appropriation. *Nev. Water Co.* v. *Powell,* 34 Cal. 118, 91 Am. Dec. 685.

The quantity of water appropriated in any case is to be measured by the capacity of the ditch or flume at the smallest point; that is at the point where the least water can be carried through it. *Ophir Silver Mining Co.* v. *Carpenter,* 6 Nev. 393.

Plaintiff's appropriation, when made, applied to the then condition of the stream. *Barnes* v. *Sabron, supra.*

The conflict in the evidence is substantial, and the findings should not be set aside. *Alhambra Addition Water Co.* v. *Richardson,* 72 Cal. 598, 14 Pac. 383.

BARNES, J.—This was a complaint filed by Clough in which he sought to enjoin defendant, Wing, from taking water from Granite creek, to his injury. He alleges that he has occupied a tract of land, about 200 acres, describing it, and has for some 15 years cultivated the same in cereals, and has set out orchards and vineyards, and that the same have by his husbandry become of great value; that except by irrigation these results could not have been accomplished, and without constant continuance of the same all would be lost; that in the year 1869 he located and appropriated sufficient of the waters flowing in Granite creek to properly irrigate the same by building flumes and digging canals in which to convey the said water from said creek upon his lands, and so he did convey the water from said creek, and did use said water as aforesaid until now; that, in 1884, defendant, knowing of plaintiff's prior right and appropriation

of said water, settled upon and occupied lands on said creek above plaintiff, and placed dams and other obstructions to the flow of the water in said creek, and constructed flumes and ditches for the purpose of diverting said water, and irrigating his lands; that between the 15th and 29th of June, 1885, he was thereby deprived of sufficient water to irrigate his lands. He prays that defendant be perpetually enjoined from using any of the water of Granite creek when needed by plaintiff as aforesaid. Defendant sets up his appropriation of water in 1884, and his use thereafter of enough to irrigate his lands, and that he has made valuable improvements, set out orchards, etc., and he alleges that plaintiff's flumes and ditches were out of repair, and wasted the water; that plaintiff in 1885 made further and additional appropriation of water by widening and building up his dam, but so that the water seeped through the same, and was lost; and denies that the water appropriated and used by him hindered plaintiff in the use of the amount of water appropriated by him, and to the use of which he had a right. Issues were framed in the form of eight questions, and a jury was impaneled to try said issues. The evidence is very voluminous as to the amount of water flowing in Granite creek, and as to whether defendant's use deprived plaintiff of the water he needed; as to the capacity of his flume, etc.,—all directed to the question whether he was injured by defendant's use of the water. The jury answered the questions, but the court saw fit to disregard the verdict of the jury, which, as an issue out of chancery, could be only advisory, and decided the case.

The court found that the evidence showed that "at the time of the alleged wrong, and at all times since defendant went upon his lands, there was and has been water enough for both parties." A careful consideration of the evidence leads us to the same conclusion. This fact settled, the plaintiff had no right to the relief he sought. *Barnes* v. *Sabron*, 10 Nev. 217; *Atchison* v. *Petersen*, 20 Wall. 507; *Basey* v. *Gallagher*, 20 Wall. 670. In the former case the court say: "If the plaintiff did not require the full amount of his appropria-

tion, he could not hold the defendant responsible in damages for not turning it down to him; he was only entitled to as much water within his original appropriation as was necessary to irrigate his land, and was bound under the law to make a reasonable use of it. In a dry, arid country like Nevada, where the rains are insufficient to moisten the earth, and irrigation becomes necessary for the successful raising of crops, the rights of prior appropriators must be confined to a reasonable and necessary use. The agricultural resources of the state cannot be developed, and our valley lands cannot be cultivated without the use of water from the streams to cause the earth to bring forth its precious fruits. No person can, by virtue of a prior appropriation, claim or hold any more water than is necessary for the purpose of the appropriation. Reason is the life of the law; and it would be unreasonable and unjust for any person to appropriate all the waters of a creek when it was not necessary to use the same for the purposes of his appropriation. The law which recognizes the vested rights of prior appropriators has always confined such rights within reasonable limits." And in the latter case the same proposition: "For this right to water, like the right by prior occupancy to mining grounds, is not unrestricted. It must be exercised with reference to the general conditions of the country, and the necessities of the people; and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual." Again, in the same opinion, it is further stated: "We think the rule is well settled, upon reason and authority, that, if the first appropriator only appropriates a part of the waters of a stream for a certain period of time, any other person or persons may not only appropriate a part or the whole of the residue, and acquire a right thereto as perfect as the first appropriator, but may also acquire a right to the quantity of water used by the first appropriator at such times as not needed or used by him. In other words, if plaintiff only appropriated the water during certain days in the week, or during a certain number of days in a month, then defendants would be entitled to its use in the other days of the week or the other days in the month."

These cases state a doctrine very different from the common law. That law had its origin in the island of Great Britain, under conditions of climate peculiar to its position, in the path of the Gulf stream, in an atmosphere laden with moisture, which is precipitated with lavish profusion upon that favored spot. That law gave to the servient and dominant heritage the right to the natural flow of the water. The riparian owner might use the water in its course to turn his water-wheel, or for other purposes, but was required to restore the same to its natural course. While he might not hinder the flow so as to injure those below him, he might depasture his domestic animals so as to drink therefrom, and take water for domestic uses. He might not drain his land so as to increase the flood to injure those below, or dam the water back upon the lands above him. 1 Inst. 4; 2 Bl. Comm. 18; Ang. Water-Courses, 8; 3 Kent, Comm. 561; *Elliott* v. *Fitchburg Co.*, 10 Cush. 193, 57 Am. Dec. 85; *Wright* v. *Howard*, 1 Sim. & S. 190; *Lux* v. *Haggin*, 4 Pac. (Cal.) 919; *Weiss* v. *Steel Co.*, 13 Or. 496, 11 Pac. 255; *Hill* v. *Lenormand*, 2 Ariz. 354, 16 Pac. 266; *Ware* v. *Allen*, 140 Mass. 513, 5 N. E. 629; *Mason* v. *Cotton*, 4 Fed. 792; *Dumont* v. *Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Jones* v. *Adams*, 19 Nev. 78, 3 Am. St. Rep. 788, 6 Pac. 442; *Pyle* v. *Richards*, 17 Neb. 180, 22 N. W. 370; *Van Orsdol* v. *Railway Co.*, 56 Iowa, 470, 9 N. W. 379; *Union Pac. Ry. Co.* v. *Dyche*, 31 Kan. 120, 1 Pac. 243; *Red River Co.* v. *Wright*, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167; *Creighton* v. *Kaneath etc. Irr. Co.*, 67 Cal. 221, 7 Pac. 658; *Moore* v. *Clearlake Co.*, (Cal.) 5 Pac. 494; *Wilcox* v. *Hausch*, 64 Cal. 461, 3 Pac. 108; *Larimer Co.* v. *People*, 8 Colo. 614, 9 Pac. 794; *Garwood* v. *Railway Co.*, 83 N. Y. 400, 38 Am. Rep. 452; *Railroad Co.* v. *Miller*, 112 Pa. St. 34, 3 Atl. 780; *Totel* v. *Bonnefoy*, 123 Ill. 653, 5 Am. St. Rep. 570, 14 N. E. Rep. 687; *Peck* v. *Herrington*, 109 Ill. 611, 50 Am. Rep. 627. The problem there to be solved was how best to drain the water off the land, and get rid of it; not how to save it, to be conducted upon the land in aid of the husbandman. The latter has been the problem in the arid portions

of the earth. From "time whereof the memory of man runneth not to the contrary," the rights of riparian owners were settled in the common law; and the right to appropriate and use water for irrigation has been recognized longer than history, and since earlier than tradition. Evidences of it are to be found all over Arizona and New Mexico in the ancient canals of a pre-historic people, who once composed a dense and highly civilized population. These canals are now plainly marked, and some modern canals follow the track and use the work of this forgotten people. The native tribes, the Pimas and Papagoes and other pueblo Indians, now, as they for generations have done, appropriate and use the waters of these streams in husbandry, and sacredly recognize the rights acquired by long use, and no right of a riparian owner is thought of. The only right in water is found in the right to conduct the same through their canals to their fields, there to use the same in irrigation. The same was found to prevail in Mexico among the Aztecs, the Toltecs, the Vaquis, and other tribes at the time of the conquest, and remained undisturbed in the jurisprudence of that country until now. It existed, also, in Peru, though there the appropriation was by the state, which constructed and maintained the canals so as to provide water for the use of the tillers of the soil. The Spanish conquerors brought the same ideas with them from Spain, where they prevailed then as now. Escriche, tit. "Agua," §§ III, IV, and "Acequia." "The Lombard kings, following the Roman practice, encouraged and extended irrigation in Italy. From Lombardy the art extended to France; while the Moors encouraged it in Spain, Sicily, and Algeria." Ency. Brit. (9th Ed.) "Necessity required it in the districts which comprise parts of the south of Spain, Portugal, and Italy, including Sicily and Greece." Id. Ruins of ancient irrigating works are found in Spain. Id. In Egypt, and in some parts of Persia, India, and China, this form of husbandry has been practiced from time immemorial, and still continues. Under the civil law, water was *publici juris*, and by that law the "first person who chooses to appropriate a natural stream to a useful purpose has

title against the owner of the land below, and may deprive him of the benefit of the natural flow of the water." Per Denman in *Mason* v. *Hill,* 5 Barn. & Adol. 1.

Thus we see that this is the oldest method of skilled husbandry, and probably a large number of the human race have ever depended upon artificial irrigation for their food products. The riparian rights of the common law could not exist under such systems; and a higher antiquity, a better reason, and more beneficent results have flowed from the doctrine that all right in water in non-navigable streams must be subservient to its use in tilling the soil. Recognizing these principles, the acts of congress March 26, 1866, extended them over the public domain wherever applicable; and all patents (16 St. U. S. §17) to land are subject to these rights to the use of water. By that act it is provided that "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." The legislature of Arizona at its first session, in 1864, enacted that (C. L. 3240) "all rivers, creeks, and streams of running water are hereby declared public, and applicable to the purposes of irrigation and mining; [3242] all the inhabitants who own or possess arable and irrigable lands shall have the right to construct public or private *acequias* [canals] and obtain the necessary water for the same from any convenient river, creek, or stream of running water;" (3243) and prohibits the obstruction of such canals, "as the right to irrigate the fields shall be preferable to all others." Up to about a third of a century ago, and but recently before this enactment, the territory of Arizona had been subject to the laws and customs of Mexico, and the common law had been unknown; and that law has never been, and is not now, suited to conditions that exist here, so far as the same applies to the uses of water. *Atchison* v. *Petersen, supra; Basey* v. *Gallagher, supra; McClintock* v. *Bryden,* 5 Cal. 100, 63 Am. Dec. 87; *People* v.

Canal Appraisers, 33 N. Y. 482; *Barnes* v. *Sabron, supra; Ophir Co.* v. *Carpenter,* 4 Nev. 534, 97 Am. Dec. 550; *Lobdell* v. *Simpson,* 2 Nev. 274, 90 Am. Dec. 537; *Strait* v. *Brown,* 16 Nev. 317, 40 Am. Rep. 497; *Crane* v. *Winsor,* 2 Utah, 248; *Schilling* v. *Rominger,* 4 Colo. 100; *Canal Co.* v. *Hoyt,* 57 Cal. 44. See *Lux* v. *Haggin,* (Cal.) 4 Pac. Rep. 919; *Judkins* v. *Elliott,* (Cal.) 12 Pac. Rep. 116; *Kaler* v. *Campbell,* 13 Or. 596, 11 Pac. Rep. 301. For a discussion of the Mexican law, see *Lux* v. *Haggin,* 69 Cal. 255, 10 Pac. Rep. 705-719; Editorial Notes, (Pomeroy,) 1 and 2 West Coast Rep.

The "local customs" of the act of 1866, so far at least as it refers to rights to the use of water, is not a mere usage or custom, requiring proofs of undisturbed continuance beyond the memory of man. 1 Greenl. Ev. § 128. The courts take knowledge of them as of the public laws. "The general customs and usages of merchants, as well as the public statutes and general laws and customs of their own country, as well ecclesiastical as civil, are recognized, without proof, by the courts of all civilized nations." 1 Greenl. Ev. § 5, and cases cited. In *Atchison* v. *Petersen* the court, without proof, took knowledge of the existence of these customs; so, of judicial decisions. The court below did not err, therefore, in excluding the judgment roll offered by plaintiff; and the oral proof of local custom could do no harm, but was not necessary.

What constitutes such appropriation is largely a question of fact. The supreme court of California defines the word "appropriation" as follows: "This appropriation is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use." (*McDonald* v. *Bear River Co.,* 13 Cal. 220;) and the supreme court of Colorado, quoting, approves this definition. "When the individual, by some open, physical demonstration, indicates an intent to take for a valuable or beneficial use, and, through such demonstration, ultimately succeeds in applying the water to the use designed, there is such an appropriation." "While a diversion must of necessity take place before the water is actually applied to the irigation of the soil, the appropriation thereof is, in legal contemplation, made when

the act evidencing the intent is performed. Of course, such initial act must be followed up with reasonable diligence, and the purpose must be consummated without unnecessary delay." *Larimer Co.* v. *People,* 8 Colo. 614, 9 Pac. Rep. 794; *Lehi Co.* v. *Moyle,* 4 Utah, 327, 9 Pac. Rep. 867. We think the appropriation of water as alleged was clearly established by both plaintiff and defendant. The judgment is affirmed.

Wright, C. J., concurs.

[Civil No. 212. Filed March 14, 1888.]

[S. C. 17 Pac. 10.]

THE TERRITORY OF ARIZONA, Plaintiff and Appellee, v. EDWARD J. COOK, et al., Defendants and Appellants.

1. PRINCIPAL AND SURETY—DEFALCATION—FALSE REPORT BY PRINCIPAL—SURETIES ESTOPPED.—In an action upon a treasurer's official bond to recover a shortage his sureties are estopped from denying the truth of their principal's reports, as to amount of money on hand made just prior to the execution of the bond and during its life, for the purpose of showing that the defalcation occurred during his previous term.

APPEAL from a Judgment of the District Court of the Third Judicial District in and for the County of Yavapai. James H. Wright, Judge. Affirmed.

The facts are stated in the opinion.

Rush, Wells & Howard, and E. M. Sanford, for Appellants.

The defense below and the appeal here is made on behalf of the sureties on the official bond of the County Treasurer and not on behalf of the principal. The bond in question was given under the Revised Statutes of Arizona of 1887, and the amendments thereto, and not under the present statute which is a copy of the Illinois statute, so that the decisions

of Illinois while of persuasive force in construing the present statute, are of no weight in determining the liability in this case.

In *U. S.* v. *Eckford,* 1 How. 263, it was said: "The amount charged to the collector at the commencement of the term is only *prima facie* evidence against the sureties. If they can show by circumstances, or otherwise, that the balance charged, in whole or in part, had been misapplied by the collector prior to the new appointment, they are not liable for the sum so misapplied." "It is, of course, always open to the defendants, sought to be charged, to show by opposing proof that the default occurred before the commencement of their liability." *United States* v. *Stone,* 106 U. S. 525, 1 Sup. Ct. Rep. 287.

The Treasurer's bond is for the term of two years. The sureties are only bound for the faithful performance of duty during that term. *Hewitt* v. *State,* 6 Har. & J. 95, 14 Am. Dec. 259, 260. The law prescribing duty of Supervisors and other officers of the county, existing at the time of entering into the bond, is part of the same. *Bigelow* v. *Bridge,* 8 Mass. 275. The question is how much money was in the hands of the treasurer at the time he entered upon the performance of the duties of his office, and, although the Treasurer might be estopped to show that he had falsified his accounts at the termination of his previous term, no such estoppel works against the sureties, who entered into no obligation concerning his actions in the preceding term. The sureties stand ready to comply strictly with the law and the letter of their obligation, "That as such Treasurer he will honestly pay over all money then in his hands, and which may hereafter come to him," and *not* that he has not in the past been in default, and that they assume to indemnify for past defalcation. The fault, or misrepresentation, or anything which misleads the sureties, and induces them to sign the bond, may be shown in defense. *Gasconade Co.* v. *Sanders,* 49 Cal. 192; *Fulton* v. *Hood,* 34 Pa. St. 365, 75 Am. Dec. 664; *Moore* v. *Boudinot,* 64 N. C. 190. Where an officer serves two terms, the sureties of his bond for the last term are not liable for the

money he should have had, as Treasurer at the commencement of that term, but which he converted during the first term. *Township of Paw Paw* v. *Eggleston,* 25 Mich. 36; *City of Detroit* v. *Weber,* 29 Mich. 24, 108; *Vivian* v. *Otis,* 24 Wis. 518, 1 Am. Rep. 199; 5 Waits Act. and Def. 6; *St. Louis* v. *Sickles,* 52 Mo. 122-127; *Farrar* v. *United States,* 5 Pet. 389; *United States* v. *Boyd,* 15 Pet. 208; *Hood* v. *Mathis,* 21 Mo. 308; *Hyneman* v. *Eder,* 17 Cal. 437, 79 Am. Dec. 139; *People* v. *Buster,* 11 Cal. 108; Vol. 8, No. 11, *Chicago Law Journal* for February, 1887; *Moore* v. *Potter,* 12 Am. Law Reg. 770.

Each term is a new office. *Poole* v. *Cox,* 9 Ired L. 69, 49 Am. Dec. 410; *Savings Bank* v. *Hunt,* 72 Mo. 602, 603, 37 Am. Rep. 449.

The bond of an officer for a term fixed by law is not security for, nor are sureties liable for, breach of duty during another term. *Treasurer of State of Vermont* v. *Mann,* 34 Vt. 371, 80 Am. Dec. 688. They are liable only for acts subsequent to the time the bond was given. *Jeffers* v. *Johnson,* 18 N. J. L. 382; *Meyers* v. *United States,* 1 McLean, 493, Fed. Cas. No. 9996; *Mayor etc.* v. *Horn,* 2 Harr. (Del.) 190.

Settlements made by the Treasurer with the county officers are not conclusive as against the sureties. *Moore Co. Com.* v. *McRae,* 89 N. C. 95; *Lewis* v. *Lee Co.,* 73 Ala. 148; *Van Sickel* v. *Buffalo Co.,* 13 Neb. 103, 42 Am. Rep. 753, 13 N. W. 19; *Webster Co.* v. *Hutchinson,* 60 Iowa, 721, 9 N. W. 901, 12 N. W. 534; *Missoula Co. Comm'r's.* v. *McCormick,* 4 Mont. 115, 5 Pac. 287; *Mutual L. & B. Assn.* v. *Price,* 19 Fla. 127; *Potter* v. *School Trustees,* 11 Ill. App. 280; *Hoboken* v. *Kamena,* 41 N. J. L. 437; *Rogers* v. *State,* 99 Ind. 218; *Cox* v. *Hill,* 5 Lea. (Tenn.) 146; *Hunt* v. *State,* 93 Ind. 311; and see Murphy on Official Bonds, secs. 634, 636, 637, 638.

The statute required the Board to *count the money on hand* at the close of the previous term, and that provision entered into the obligation of the sureties and they had a right to believe that the board had done its duty and have a right to show that the money was not in fact in the Treasurer's hands at the commencement of the term. They are presumed to contract on the faith of it. *U. S.* v. *Nicholl,*

12 Wheat. 505; *Walsh* v. *Bailie,* 10 Johns. 180; *U. S.* v. *Boyd,* 15 Pet. 187; *Riddel* v. *School Dis.,* 15 Kan. 168; *Mayor etc.* v. *Horn,* 2 Harr. 190; *Chelmsford Co.* v. *Demasert,* 7 Gray, 1; *Mayor of Rahway* v. *Crowell,* 40 N. J. L. 207, 29 Am. Rep. 244; *Winneshiek Co.* v. *Maynard,* 44 Iowa, 15.

The Supervisors were in contemplation of law, the agents of the obligee in the bond, and the sureties were justified in acting upon presumption that they had performed their whole duty in counting the money, and knowing that it was in the treasury as they certified. *Inhabitants* v. *Randall,* 105 Mass. 295, 8 Am. Rep. 519; *Farrar* v. *U. S.,* 5 Pet. 374; *U. S.* v. *Boyd,* 15 Pet. 208; *U. S.* v. *Eckford Ex.,* 1 How. 262; *U. S.* v. *Boyd,* 5 How. 48; *Bruce* v. *U. S.,* 17 How. 443; *Nolley* v. *County Court,* 11 Mo. 447; *Mahaska* v. *Ingalls,* 16 Iowa, 85; *Bessinger* v. *Dickman,* 20 Iowa, 261; *Detroit* v. *Weber,* 29 Mich. 24; *Bissell* v. *Saxton,* 66 N. Y. 55; *Patterson* v. *Inhabitants,* 38 N. J .L. 256; *Vivian* v. *Otis,* 24 Wis. 518, 1 Am. Rep. 199.

Briggs Goodrich, Attorney-General, for Appellee.

BARNES, J.—This was a suit by plaintiff upon the official bond of defendant Cook as treasurer of the county of Yavapai. It appears that he has been such treasurer for five successive terms of two years each. That at the expiration of the term ending December 31, 1884, he, as such treasurer, as required by law, (chapter 6, and amendment of October 4, 1867, Comp. Laws,) had and filed with the board of supervisors of Yavapai county, his regular quarterly and annual settlements. That in such settlements he charged himself with the sum of $46,026.23. as being the balance in his hands as such treasurer. That such settlements were duly examined and approved by the said board of supervisors. That thereafter, during his last term of office, and at his first quarterly settlement as such treasurer, he charged himself with said balance as having actually come to his hands from himself as his predecessor, and continued afterwards from time to time, at each annual and quarterly settlement, to report the same in his hands, or using said balance in his first quarterly set-

tlement, and then the balance from each settlement as made and shown therein. That each settlement commenced with the statement of the balance in treasury or on hand at last settlement, and ended with a statement of balance in treasury. That each and every part of said settlements were duly approved by the said board of supervisors, except the last statement of account, which was also approved after some corrections, and changes were made in the same by said Cook and said board of supervisors. That the books of said E. J. Cook as such treasurer show the same balances and amounts as the settlements made by him. It was made to appear that at the time of his final settlement the amount of money which his last approved statement showed to be in his hands as such treasurer was not there; in fact that the treasury was short the amount of money sued for. The bond sued on is the official bond for the term 1885 and 1886, and the suit is for money which his statements and settlements represented as being in the treasury at the end of that term. Defendants asked to be allowed to introduce evidence as to what had occurred before the board of supervisors at the times of the successive settlements of his accounts; to ask whether the money in the treasury was actually counted; to ask whether, at the time of the settlement in December, 1884, and before this bond was given, he actually had in the treasury the money his statements showed, and so as to the succeeding statements; to ask whether he did not produce certificates of deposits upon various banks as cash in the treasury. This evidence the court refused to allow. These rulings present the question asked by the appellants: "Are the sureties permitted to go behind the settlements made by the board of supervisors with the treasurer, and show that the default charged occurred before the commencement of their liabilities?" They urge with great force and ability that they should be allowed to show that the statements by the treasurer of the amount of money on hand were false, and that the defalcation occurred before this bond was executed, and that the shortage in the cash was continued down to the end of this last term.

The obligation of this bond, among other things, was that the treasurer should faithfully discharge the duties of his office. One of his duties was to correctly report to the board of supervisors the amount of money in the treasury. To falsely report was a breach of his duty, for which his sureties were liable on this bond. It is conceded that the sureties on this bond are not liable for breaches of duty during the former term of office. The cases cited upon this point will not be questioned. The question here is this: May he and his sureties dispute that he had in the treasury the money that he reported from time to time that he had, and on the faith of which reports his settlements were made and approved? It is admitted by appellants that the treasurer is estopped, but they insist that the sureties are not, and that they may show that the statement of money on hand December, 1884, just before the term covered by their bond began, was false, and that the treasurer did not then have the money. They permitted him, from time to time thereafter, to report the amount of money on hand. They could, before they executed the bond, and at any time thereafter, have ascertained the amount of cash in the treasury, and so verify his reports. His sureties had notice, or are charged with notice, of the amount of money he reported as in his hands at the beginning of his last term. They obligated themselves that he should "pay over all money then in his hands." They, as well as he, are estopped to deny that that money was in his hands. The same point was urged in *Morley* v. *Town of Metamora,* 78 Ill. 394, 20 Amer. Rep. 266, and the sureties were held liable. "The supervisor was his own successor in office. He had made his annual report, in which he charged himself with having a certain amount of money in his hands. That report was approved, and we must presume it was true." "Conceding that fact, (that default occurred in former term,) we do not think it relieves the sureties on the bond upon which this action is brought from liability." To the same effect is *Pinkstaff* v. *People,* 59 Ill. 148. In *Roper* v. *Trustees of Sangamon Lodge,* 91 Ill. 518, 33 Am. Rep. 60, it was urged "that the court should have

admitted evidence that the defalcation occurred the term before appellants became sureties on this bond." Upon the authority of the foregoing cases, judgment was affirmed. In *Chicago* v. *Gage,* 95 Ill. 593, 35 Amer. Rep. 182, the court say: "Gage was his own successor in office. It was his duty, as incoming treasurer, to receive the treasury balance from his predecessor. If he entered it in his treasury books after the beginning of his second term as having actually come to his hands from his predecessor, and continued afterwards, from time to time, to return and report the same as in his hands, both he and his sureties, we think, should now be concluded from denying that this balance did actually come into Gage's hands as treasurer." It was his duty to keep such accounts, and make such reports; and to "falsify them, and show that these balances, etc., were not at the time actually in the treasury, would be inadmissible, as we conceive, upon sound legal principle." "And we are of opinion that the sureties should be equally concluded here with Gage himself." The court cites *Commissioners* v. *Mayrant,* 2 Brev. 228; *McCabe* v. *Raney,* 32 Ind. 309; *Stovall* v. *Banks,* 10 Wall. 583; *Baker* v. *Preston,* 1 Gilmer (Va.), 235; *U. S.* v. *Girault,* 11 How. 27; *Evans* v. *Keeland,* 9 Ala. 42. In *Insurance Co.* v. *Simmons,* 131 Mass. 85, 41 Am. Rep. 196, the court held the sureties were not discharged by laches of creditor in not compelling payment after knowledge of default. "It is the business of the surety to see that his principal performs the duty which he has guarantied, and not that of the creditor." *Wright* v. *Simpson,* 6 Ves. 714; *President etc. Adams Bank* v. *Anthony,* 18 Pick. 238; *Atlantic & Pac. Tel. Co.* v. *Barnes,* 64 N. Y. 385, 21 Am. Rep. 621; *McKecknie* v. *Ward,* 58 N. Y. 541, 17 Am. Rep. 281. In *Boone* v. *Jones,* 54 Iowa, 699, 37 Am. Rep. 229, 2 N. W. Rep. 987, 7 N. W. Rep. 155, it was held that, "in an action on a county treasurer's bond, the principal's accountings and settlements made in pursuance of law are conclusive against him and his sureties." The court cites, with approval, *McCabe* v. *Raney, Baker* v. *Preston, Morley* v. *Metamora,* and *Chicago* v. *Gage, supra.* On a rehearing the decision was adhered

to. The authority of *Baker* v. *Preston* has been questioned and the decision criticised. *State* v. *Rhoades,* 6 Nev. 352, and *State* v. *Newton,* 33 Ark. 276; and see note to *Boone Co.* v. *Jones,* 37 Am. Rep. 234. In *State* v. *Grammer,* 29 Ind. 530, the court, of *Baker* v. *Preston,* say: "We regard the reasoning in that case as entirely satisfactory, and we know of no case holding a contrary doctrine." We are satisfied that the weight of authority and the better reason sustains that case and *Chicago* v. *Gage,* and that the law is that both the principal and sureties are concluded by the report of the principal, made according to law, as to the amount of money in his hands. We therefore see no error in the record.

The judgment is affirmed.

[Civil No. 242. Filed March 20, 1888.]

[S. C. 17 Pac. 97.]

T. J. BRYAN, Plaintiff and Appellant, v. D. H. PINNEY, Defendant and Appellee.

1. COURT—SUPREME COURT—ADJOURNED TERMS—REV. ST. U. S. 1878, SEC. 1934, CONSTRUED.—An adjourned term of the Supreme Court, held pursuant to an order signed by a majority of the judges, under Rev. St. U. S., Sec. 1934, is a distinct and separate term and not merely an adjourned *session* of the same term.

2. APPEAL AND ERROR—TRANSCRIPT—LEAVE TO FILE—SHOWING SUFFICIENT—REV. ST. ARIZ. 1887, par. 938, CITED.—Under par. 938, *supra,* where a party is unable to file his transcript in the time limited therein, from any unavoidable cause, the court shall, upon satisfactory proof thereof, permit such transcript to be filed at a later period: Held, appellant's showing on a cross-motion for leave to file the transcript sufficient.

APPEAL from a Judgment of the District Court of the Second Judicial District in and for the County of Maricopa. W. W. Porter, Judge. Motion to dismiss appeal. Denied.

The facts are stated in the opinion.

Goodrich & Street, for Appellant.

Baker & Campbell, for Appellee.

BARNES, J.—In this case appellee moves to dismiss the appeal on the ground that the transcript was not filed on the first day of the term. Section 938, Rev. St., provides that "it shall be the duty of the appellant or plaintiff in error to file a transcript of the record with the clerk of the supreme court on or before the first day of the next succeeding term, held after the appeal was perfected, or the summons for writ of error was served, and that if after 30 days before the next term it shall be filed at the next term." In this case the final judgment was rendered on the 13th day of December, A. D. 1887, and notice of appeal given; and bond was filed and appeal perfected on the 16th day of January, A. D. 1888. The regular term of this court began on the second Monday of January at Prescott. At that term the judges signed an order for an adjourned term of said court at Tucson March 1st, and an order for an adjourned term in June, at Prescott. Rev. St. U. S. § 1934, provides that the supreme court of Arizona may hold adjourned terms thereof at any time and place in the territory agreed upon by a majority of the judges of the court at any regular term thereof. The order for an adjourned term shall be signed by a majority of the judges thereof at a regular term of the court, and entered upon the minutes of the court, and any business which said court might do at any regular term thereof may be done at such adjourned term. It is insisted that this is not a term of court, but is merely an adjourned session of the January term, and hence that this transcript will be due under the statute at the January term of this court, 1889. We are referred to the case of *Bank* v. *Withers*, 6 Wheat. 107. There the law provides that "said courts are hereby invested with the same power of holding adjourned sessions that is exercised in Maryland," and the court held this did

not make the adjourned session a distinct session. There is a broad distinction between an "adjourned session" and an "adjourned term." The word "session" means a meeting of the court. Term has a definite meaning, well known and well understood. Counsel argues that the words "sessions" and "terms" are synonymous. If they are synonymous, then this is the next session of the court. It is evident, however, that it was the intention of the act of congress that these adjourned terms should be distinct and separate terms, and that the business transacted should be the same as at a regular term. However, section 938 above, provides that where a party is unable to file such transcript in the time limited by this section, from any unavoidable cause, the court shall, upon satisfactory proof thereof, permit such transcript to be filed at a later period. The appellant in this case, upon what is deemed a sufficient showing, has made a cross-motion for leave to file the transcript; which motion is allowed.

Wright, C. J., and Porter, J., concur.

[Civil No. 236. Filed April 5, 1888.]

[S. C. 17 Pac. 564.]

DANIEL O'TOOLE, et al., Plaintiffs and Appellants, v. JOHN MELANDER, et al., Defendants and Appellees.

1. APPEAL AND ERROR—CONFLICT OF EVIDENCE—VERDICT OF JURY WILL NOT BE DISTURBED.—Where the testimony is contradictory this court will not disturb the verdict of a jury.
2. TRIAL—SUIT IN EQUITY—VERDICT OF JURY ADVISORY.—In a suit in equity a verdict of the jury is only advisory.

APPEAL from a Judgment of the District Court of the First Judicial District in and for the County of Cochise. Wm. H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

Ben Goodrich, for Appellants.

Herring & Herring, (Thomas Mitchell, of counsel,) for Appellees.

The only question in this case was whether the work or improvement required by this law had been done for or by the plaintiffs for the year 1885. This naked question of fact was submitted to a jury and was found in our favor, and thereupon the plaintiff's complaint was dismissed by the Court.

This was not an action of ejectment, but an action to quiet title, which under our practice is treated as a bill in equity. *Brandt* v. *Wheaton*, 52 Cal. 430. A verdict of a jury in such a case is merely advisory, and hence an appellate court will never consider the question—whether the verdict was right, or whether the court ought or not to have disregarded it, or whether he ought to have granted a new trial of the issue by the jury. *Bates* v. *Gage*, 49 Cal., 126. But we submit that under any system of practice where the evidence was oral, the reason of the thing would forbid the appellate court to disturb the finding or verdict unless it affirmatively appears that the finding or verdict was clearly unsupported by any evidence.

The learned judge at the trial was not bound by the rules which govern at common law. The object of a verdict in a chancery case is, to advise the court and satisfy his conscience; and hence the court will often direct the issue to be tried over again, if his conscience is not thoroughly informed, in cases in which at law a new trial would be refused. Daniel Ch. P., p. 1120-21 (5 ed. p. 1073.) Or, if satisfied that the verdict is wrong, he may disregard it entirely, and in entering the decree find the fact as he thinks the evidence requires him to. *Basey* v. *Gallagher*, 20 Wall. 679. In the present case the trial Judge was urged to do this, and was thoroughly advised in the premises, but he adopted the finding of the jury and dismissed the plaintiffs' action.

PER CURIAM.—The only question arising in this cause

is whether or not the assessment work of $100, required by the act of congress, was done in the year 1885. The action was to quiet title. A jury was had, which jury rendered a verdict for the appellees. The testimony was contradictory, and it is too well settled to require citations of authorities, that the supreme court will not disturb the verdict of the jury when such a contradiction exists. This being an action in equity, and the verdict being only advisory, the trial judge would feel less hesitancy to disregard the verdict than in an action at law. The judge, as well as the jury, was brought face to face with the witnesses, and could judge of their credibility. The injunction is dissolved, and the judgment affirmed.

Wright, C. J., and Porter and Barnes, JJ., concur.

[Civil No. 237. Filed May 25, 1888.]

[S. C. 18 Pac. 276.]

CHARLES DYKE, Plaintiff and Appellant, v. P. V. CALDWELL, Defendant and Respondent.

1. IRRIGATION—NOTICE OF APPROPRIATION—EVIDENCE—EFFECT OF—REASONABLE TIME FOR COMPLETION OF WORK—EVIDENCE OF INTENT TO APPROPRIATE.—While mere posting of notice of appropriation, unaccompanied by work, is insufficient to constitute an appropriation, yet it tends to show that, in accordance therewith, the work was done. Where one has done no work, but has taken all the preliminary steps for the construction of his ditch, he should have a reasonable time therefor. The building of a house on land worthless without water is evidence of intent to appropriate.

REV. ST. U. S. 1878, § 2339, REV. ST. ARIZ. 1887, par. 3201, CITED.

APPEAL from a Judgment of the District Court of the First Judicial District in and for the County of Pima. Wm. H. Barnes, Judge. Modified.

The facts are stated in the opinion.

Hereford & Lovell, for Appellants.

Ben Goodrich, for Respondent.

PORTER, J.—On the 9th of January, 1886, respondent (defendant in district court) filed his declaratory statement for pre-emption of a quarter section of land, which land "straddles" the San Pedro river; a part of the land lying on either bank of the river. During the dry seasons the water does not flow in the river, and is confined to pools in the bed of the river, and which pools are upon the respondent's pre-emption claim, upon which he entered on the 8th day of January, 1886. On the 30th day of November, 1885, appellant (plaintiff in district court) filed his declaratory statement for pre-emption of another quarter section, further down the river from respondent's, upon which he had gone to settle on the 26th day of November, 1885. Respondent testifies, upon going on the land, he went to the San Pedro river to see if he could find a place where he could get water, and convey it on the land for irrigation, as no crop could be raised on the land without irrigation. "On examination, he found the pools mentioned in plaintiff's complaint; and, at the point just below, the bed of the river was so filled with rock, gravel, and sand as to form a dam across the river of sufficient height to enable him to convey the water onto the land during the seasons of high water; and when the water of the river was sufficiently high to flow over the dam. That the dam appeared to be very strong, and was evidently the cause of the lower pool;" and that there was no other place where a ditch could be constructed so as to convey the flowing water onto his land, and which could only be done when there was a regular flow of water in the river. That immediately he commenced building his house, which he completed in February, 1886. That on the 12th day of December, 1885, he went to the dam at the lower pool, accompanied by Thomas Gardiner, and located the right and claim to take the water flowing from that point, by means of a ditch. That, assisted by Gardiner, he commenced constructing the ditch at the lower end of the pool, and dug a ditch in the sand in the bed of the river, from 15 to 20 feet in length, and from 15 to 20 inches deep below the surface of the water in the pool. That they dug it as deep as they could, and did no more

work on it till the latter part of February, 1886. That they turned the water into it, and posted a notice at the head of the ditch, where it could be plainly seen by any one passing along the river in that vicinity, and which notice was afterwards recorded. Appellant further testified that, as soon as he located his water-right, he prepared the instruments, and commenced to survey the line of his ditch; that, while not working on his house, he was clearing out the timber and underbrush in line with his ditch on his own land, until the injunction was served upon him; that a part of the line of the survey was upon an old ditch which had been constructed by parties unknown, years before, and that it did not require any excavation,—it being only necessary to remove or burn the brush and logs from it; that he had cleared it all off, and had excavated and completed about 150 feet of new ditch before he was enjoined; that he told plaintiff he was going to take the water that would flow over the dams; that, since the commencement of this suit, a flood had washed away the top of the dam, at least two feet below his ditch; and that he would have to raise the dam to its former height, which would raise the water in the pools two feet higher. Thomas Gardiner testified to posting notice, and location by the first digging and survey of the line of ditch, and the carrying away the top of the dam; that the survey was commenced in December, 1885, and completed in January, 1886. The respondent testified that he took his land up for a stock ranch; that the land was not suitable for agriculture without irrigation, and was only valuable on account of the water for stock; that in the dry season there was no other place for the stock to get water except in the pools on his land; that their drainage would make his place valueless; that, on account of the elevation of his land, the water could not be brought upon it to irrigate for agricultural purposes. The only conflict in the evidence is the testimony of respondent, who says "that at the time he went on the land, and made his entry in the land-office, in January, 1886, there was no indication of any work on the ditch, and no ditch; and that he had no notice of defendant's claim. At the time the suit

was brought, defendant was working on the ditch on plaintiff's land." The district court finds "that, during the dry seasons of the year, the waters of the San Pedro river cease to flow in its bed for some distance, both above and below said pools; that defendant, in February, 1886, commenced the construction of a ditch, for the purpose of conveying the water from said pools, situate on plaintiff's said land, to lands of his own, lower down the river; * * * that if defendant is permitted to construct said ditch, and carry away, by means thereof, the water from said pools on plaintiff's lands, the value of said lands will be greatly lessened and damaged."

We cannot see that the findings are supported by the evidence. Though the posting of a notice, unaccompanied by appropriation of the water by work, is not sufficient, yet it tends to show that, in accordance therewith, the work was done. There is no conflict as to the survey and the clearing away the brush and logs along the line of the old and abandoned ditch. A very short time had elapsed from settling on the land by appellant before he was enjoined. If appellant had done no work, but had taken all the preliminary steps for the construction of his ditch, he should have reasonable time therefor. He knew the land was worthless without water, and that it could not be obtained except from the pools. His building his house alone gave evidence of his purpose. In *Basey* v. *Gallagher,* 20 Wall. 670, the court say: "In the late case of *Atchison* v. *Peterson,* 20 Wall. 507, we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain, and we there held that, by the custom which had obtained among miners in the Pacific states and territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it. * * * The views there expressed, and the rulings made, are equally applicable to the use of water on the public lands for the purposes of irrigation. No distinction is made in those states and territories, by the customs of miners or

by the courts, in the rights of the first appropriator, from the use made of the water, if the use be a beneficial one." The act of congrees of July 26, 1866, enacts, (paragraph 9:) "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed." The law of this territory is: "All the inhabitants of this territory who own or possess arable and irrigable lands shall have the right to construct public or private *acequias,* and obtain the necessary water for the same, from any convenient river, creek, or stream of running water." (Rev. St. par. 3201.) We cannot see how the value of respondent's land will be greatly lessened and damaged; the testimony on part of respondent being "that there was no feed for stock on the land described in the complaint, but the stock ranged back on the hills, and came to the pools for water;" that the testimony is "that, if the pools were drained, it would destroy its value for stock-raising." But the declared purpose of appellant is to use the water flowing over the dam; that he could not avail himself of the water unless it passed over the dam. There is no proof that irreparable injury would be done to respondent. It was not shown that the ditch would drain the pools, and no damage could arise unless they were drained.

The judgment is so modified as to allow the appellant to heighten the dam at the lower pool, and so construct his ditch that the water which flows over the dam shall pass into his ditch; and the injunction is so modified. Appellant must, however, be restrained from draining the pools.

Wright, C. J., and Barnes, J., concur.

[Civil No. 226. Filed May 25, 1888.]

[S. C. 18 Pac. 273.]

E. O. SHAW, Plaintiff and Appellant, v. COUNTY OF PIMA, Defendant and Appellee.

1. OFFICE AND OFFICERS—SALARIES—DE FACTO OFFICERS.—Where a county has paid to a *de facto* officer, holding under color of title, salary for the time actually spent in performance of his duties such payment is complete defense to suit for the same salary by the *de jure* officer.

APPEAL from a Judgment of the District Court of the First Judicial District in and for the County of Pima. Wm. H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

Cameron H. King, Goodrich, Smith, Street & Goodrich, Thos. D. Satterwhite and Geo. L. Hood, for Appellant.

The salary and emoluments of an office are incident to the title to the office. See dissenting opinion of Cooley, Judge, in *Wayne Co.* v. *Benoit,* 20 Mich. 176, 4 Am. Rep. 382; *People ex rel. Morton* v. *Tieman,* 30 Barb. 193; *People* v. *Hopson,* 1 Denio, 579; *Riddle* v. *The County of Bedford,* 7 Serg. & R. 386. A *de jure* officer has the sole right to the salary of his office, and may recover the same from the public treasury, although it has been paid to an intruder. *People* v. *Nostrand,* 46 N. Y. 375 and 382; *People* v. *Tieman,* 8 Abb. Pr. 35 and 361; *Mayor* v. *Flagg,* 6 Abb. Pr. 296 and 302; *Carroll* v. *Siebenthaler,* 37 Cal. 193; *People* v. *Smyth,* 28 Cal. 21; *People* v. *Carter,* 29 Barb. 208; *Nichols* v. *McLean,* 63 How. Prac. 448; *Stadler* v. *City of Detroit,* 13 Mich. 346; *Selby* v. *City of Portland,* 14 Or. 243, 12 Pac. 377.

Payment to another even if he were a *de facto* officer is no defense to an action by the officer *de jure* for his salary. *People* v. *Collins,* 7 Johns. 549; *Hull* v. *Luther,* 13 Wend. 491; *Mayor* v. *Flagg,* 6 Abb. Pr. 296; *People* v. *Smyth,* 28 Cal. 21; *People* v. *Oulton,* 28 Cal. 44; *People* v. *Brennan,* 30 How.

Pr. 418; *Comstock* v. *City of Grand Rapids,* 40 Mich. 397; *People* v. *Miller,* 24 Mich. 459, 9 Am. Rep. 131.

The reversal of a judgment removing an officer from office restores him thereto without need of any further order. *Phares* v. *State,* 3 W. Va. 567, 100 Am. Dec. 777. The granting of a new trial vacates and sets aside the judgment. *Thompson* v. *Smith,* 28 Cal. 527.

"It is well settled that a *de facto* officer cannot recover the compensation or salary annexed to such office. That such salary is incident to the title to the office and not to its occupation and exercise." *Burke* v. *Edgar,* 67 Cal. 184, 7 Pac. 488; *People* v. *Potter,* 63 Cal. 127; *People* v. *Smyth,* 28 Cal. 21; *People* v. *Oulton,* 28 Cal. 44; *McVeany* v. *Mayor,* 80 N. Y. 185, 36 Am. Rep. 600; *Mayor and Alderman* v. *Woodward,* 1 Central Law Jour. 587; *Shannon* v. *Baker,* 33 Ind. 390.

If a person is legally entitled to an office of which he is not in actual possession, it is his property and he cannot be restricted to the compensation provided therefor but may demand the office itself. *Glasscock* v. *Lyons,* 20 Ind. 1, 83 Am. Dec. 299.

Special attention is called to the decision in the case of *Andrews* v. *City of Portland,* 79 Me. 484, 10 Am. St. Rep. 280, 10 Atl. 458.

H. R. Jeffords, District Attorney, for Appellee.

PORTER, J.—The facts of this case are these: There was an election held in the county of Pima, on November 4, 1884, for the office of sheriff. Afterwards the board of supervisors canvassed the votes, and declared plaintiff elected, and delivered the certificate to him. Thereafter he qualified and gave the required bond, and after such qualification, the clerk of the district court granted him a certificate that he had so qualified and given such security. At the time plaintiff was to take the office, to-wit, January 1, 1885, he served the last-named certificate upon R. H. Paul, the former and then sheriff, and entered upon the discharge of the duties of the office. On the 15th of December, 1884, Paul filed his state-

ment in the district court, contesting the election of Shaw, and on the trial of such contest, on the 3d day of January, 1885, judgment was pronounced in favor of Paul. Thereupon, Paul, on the 3d day of January, 1885, qualified, gave bonds, and entered upon the duties of the office. There was no stay of proceedings on the judgment, nor was there any appeal taken therefrom to the supreme court. The salary was paid to Paul by the board of supervisors. On the 9th of January, 1886, Shaw served notice of motion for new trial in this contest case before the district court, and on the hearing on April 3, 1886, a new trial was granted, that Paul, on the 3d of April, 1886, appealed from the order granting a new trial to the supreme court, and then and there gave an undertaking on appeal in the sum of $300. The court ordered that in case Paul desired to retain the office, pending the appeal, he should give a bond in the sum of $5,000 to operate as a *supersedeas* in addition to the $300 bond, or, in lieu thereof, deposit with the clerk the sum of $3,600, with privilege of withdrawal upon filing the bond. On 10th April, 1886, Paul deposited the $3,600, whereupon a stay of proceedings was granted. On 14th June, 1886 Paul and Shaw stipulated in writing that the appeal be dismissed, and that the money deposited may be withdrawn, and the order granting the *supersedeas* be vacated, and pursuant to the stipulation, on the 19th July, 1886, the appeal was dismissed, and the money withdrawn, and it was further and expressly stipulated that Shaw should release Paul from any debt or obligation or demand or cause of action which might be due from Paul for withholding the office from Shaw. On the 9th day of July, 1886, Shaw re-entered upon the discharge of the duties of the office, and continued to discharge the same until the expiration of the term. The salary of the sheriff was $7,500 a year, payable quarterly. On the 23rd of December, 1886, plaintiff presented his demand in writing, verified, for the sum of $9,375, to the board of supervisors, and on the 6th day of January, 1887, the board disallowed the same. Whereupon plaintiff brought suit in the district court against Pima county, and judgment was had for de-

fendant. Plaintiff moved the court for a new trial, which motion was denied, and from which denial this appeal is taken.

For the decision of this case it is unnecessary to determine the first question suggested by defendant whether the district court could grant a new trial of election contests. It will be observed that there was a judicial determination of the rights to this office on the 3d day of January, 1885, and that thereafter on same day Paul entered upon the duties of the office; that not until the 9th day of January, 1886, did Shaw move for a new trial, and the new trial was granted on the 3d day of April, 1886. Should the county, after Paul had been declared by a competent court to be entitled to the office, with no notice to the board of supervisors of further action, have withheld his salary while he was performing the duties of the office? While this judgment continued in force he was the sheriff *de jure.* "They paid him the salary under the judgment, as they were bound to do, and the law protects them in this payment." Viewing Paul, however, as only the sheriff *de facto,* in *Dolan* v. *Mayor,* 68 N. Y. 274, 23 Am. Rep. 168, decided in 1877, the court says: "We are of opinion that payment to a *de facto* public officer of the salary of the office, made while he is in possession, is a good defense to an action brought by the *de jure* officer to recover the same salary after he has acquired or regained possession. * * * If fiscal officers, upon whom the duty is imposed to pay official salaries, are only justified in paying them to the officer *de jure,* they must act at the peril of being held accountable in case it turns out that the *de facto* officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary a second time. * * * Disbursing officers charged with the payment of salaries, have, we think, a right to rely upon the apparent title, and treat the officer who is clothed with it as the officer *de jure,* without inquiring whether another has the better right. Public policy accords with this view." "Public offices are created in the interest and for the benefit of the

public. Such at least is the theory upon which the statutes creating them are enacted and justified. Public and individual rights are to a great extent protected and enforced through official agencies, and the state and individual citizens are interested in having official functions regularly and continuously discharged. The services of persons clothed with an official character are constantly needed. They are called upon to execute the process of the courts, and to perform a great variety of acts affecting the public individuals. It is important that the public offices should be filled, and that at all times persons may be found ready and competent to exercise official powers and duties. If, on a controversy arising as to the right of an officer in possession, and upon notice that another claims the office, the public authorities could not pay the salary and compensation of the office to the *de facto* officer, except at the peril of paying it a second time, if the title of the contestant should be established, it is easy to see that the public service would be greatly embarrassed and its efficiency impaired. Disbursing officers would not pay the salary until the contest was determined, and this in many cases would interfere with the discharge of official duties. *McVeany* v. *Mayor*, 80 N. Y. 185, 36 Am. Rep. 600, decided in 1880, reviewing the New York cases, says: "It is then to be deduced from the cases in this state that, as a general principle, the rendition of official service must precede a right to demand and recover the compensation given by law to the officer; that the disbursing officer of a municipality is protected from a second payment of that compensation, and so is his superior, when he has once made payment to one actually in the office, discharging the duties of it with color of title, with his right thereto not determined against him by a competent tribunal; that when there has been such adjudication, any amount of compensation for services rendered not paid to him is due and payable to the one adjudged to be the officer *de jure*, and may be recovered by the latter of the municipality." Let us test the case at bar by that case. Paul held the office for one year, with the adjudication in his favor. Then, that far he was entitled to the salary. He

"had color of title" at least. The giving a new trial was not an adjudication of his right to hold the office, but, granting that it was, on the appeal to the supreme court by Paul the court required a *supersedeas* bond in the sum of $5,000, or, in lieu thereof, a deposit of $3,600, and the money was deposited. Thus Shaw was protected to the amount of salary thereafter accruing, and this seems an answer to part of the reasoning of Judge Cooley in his dissenting opinion in *Auditors* v. *Benoit*, 20 Mich. 176, 4 Am. Rep. 382, decided in 1870, in which he says: "What a farce would that be, to hold that when the county authorities are in possession of a sum of money which rightfully belongs to the defendant, they may excuse themselves from paying it over by giving him a cause of action to the same amount against another person, who may or may not be able to respond, and who, in any event, is to be made to pay only after the expense of a suit at law." The majority opinion in that case is conclusive of the case at bar, which decides "that it cannot be possible that a county can be liable to pay the same salary twice over, and if the present claimant can demand the money, it must be because the payment to Miller was not warranted. And this can only be upon the assumption that the county authorities were bound to prevent the defeated party from getting the salary until the suit was decided. Whatever may be the case in regard to a mere intruder, without any claim or color of title, there can be no doubt that a person actually obtaining office with the legal *indicia* of title is a legal officer until ousted, so far as to render his official acts as valid as if his title were not disputed." *People* v. *Miller*, 24 Mich. 458, 9 Am. Rep. 131, is another phase of *Auditors* v. *Benoit*, and decides that the salary could be reversed against the wrongful holder of the office. *Mayfield* v. *Moore*, 53 Ill. 428, 5 Am. Rep. 52, is to the same effect.

Commissioners v. *Anderson*, 20 Kan. 298, 27 Am. Rep. 171 was a case very similar to the case at bar. Anderson and Wildman were opposing candidates for county clerk. Anderson secured a majority of the votes, and he was awarded the certificate of election. Irregularities occurred in the election, and Wildman contested. The contest court decided

in favor of Wildman, awarding him the certificate, and annulling Anderson's. Wildman qualified and took possession of the office. The case then went to the district court, and the judgment of the contest court was reversed. Wildman then appealed to the supreme court, when the judgment of the district court was affirmed, upon which decision he delivered the office to Anderson. The county commissioners had knowledge of the contest, but paid the salary to Wildman. The court says: "Are the county commissioners, as representatives of the county, liable to Anderson for the salary which they have already paid to Wildman? We think not." *Auditors* v. *Benoit, supra; Smith* v. *Mayor,* 37 N. Y. 518; *Conner* v. *New York,* 5 N. Y. 285. And *Smith* v. *Mayor* holds that no claim could be brought for salary or perquisites covering any period when the claimant was not actually in office, and this was put upon the ground that they are the reward of express or implied services, although wrongly hindered from occupying a position in which he might render them. And so it is held in *Conner* v. *New York,* 5 N. Y. 285. It is held otherwise in *Dorsey* v. *Smyth,* 28 Cal. 21. Chief Justice Campbell, in the Michigan case, says, the California case is based upon New York cases, which are not law in the latter state, and which were made in disregard of the previous decision in *Conner's Case.* It has no reasoning of its own, and does not seem warranted on principle." And says further that "there is an entire absence of authority elsewhere in favor of such a principle." The facts of *Dorsey* v. *Smyth* were these: Dorsey was contesting the election against Platt. Brown was the then incumbent, and while the contest was going on he refused to give up the office. The office was awarded to Dorsey, but before the end of the contest Brown received the salary, paid to him in obedience to a *mandamus* issued by the district court. Judge Sanderson's opinion was: "Having the title to the office, the relator is entitled to the salary from the commencement of the term for which he was elected, and he cannot be deprived of it by the usurpation of Brown or the wrongful payment of the same to the latter by the direction of a court in a proceeding to which he was not a party." But in the case before us

there was a judgment of the district court in favor of Paul, in which Shaw was a party litigant, and from which judgment there was no stay of proceedings nor any appeal taken, of which judgment it must be presumed the board of supervisors had knowledge, and in accordance with which they rightfully paid the salary to Paul. Then, after one year had elapsed, and a new trial was granted, it must be further presumed that they knew of the appeal and the requirement of security in order for Paul to continue in office. While the appeal granting a new trial was pending, Shaw, of his own volition, released the hold he had on Paul for the salary. He had the bird in hand, viz., $3,600, but turned it loose in the bush. We do not think the court erred in refusing to strike out the portions of the agreed statement of facts, viz., the stipulation and agreements made between Paul and Shaw, and the judgment and orders in the district court of *Paul* v. *Shaw*. Counsel for appellant confidently rely on a late case decided by supreme court of Maine, (*Andrews* v. *City of Portland*, 79 Me. 484, 10 Am. St. 280, 10 Atl. 458,) which seems to sustain their views, in which it is remarked that the cases are irreconcilable. That was a case where the mayor and aldermen themselves removed the city marshal. On *certiorari* to the mayor and aldermen the proceedings for removal were quashed. The city had notice of the plaintiff's claim, and that the title to the office was in litigation. *Nichols* v. *MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, 5 N. E. 347, quoted in the opinion in the *Portland Case* as sustaining the court, only goes to the question of holding the illegal holder of the office liable for the salary, and that is not controverted in any of the cases to which was above alluded. It is so conceded.

We repeat that it was the duty of the board of supervisors to pay Paul, while no action was pending, during the time he was in the performance of the duties of the office, and Shaw was sleeping on his rights, and when apprised of a further contest by the order granting a new trial they were secure in a continued payment because the money was up to save Shaw harmless. Judgment is affirmed.

Wright, C. J., and Barnes, J., concur.

[Civil No. 225. Filed June 20, 1888.]

[S. C. 18 Pac. 595.]

CHARLES PHILES, et al., Plaintiffs and Appellees, v. WILLIAM W. HICKIES, et al., Defendants and Appellants.

1. MINES AND MINING—SALE—RECOVERY OF CONSIDERATION—DEFENDANT ESTOPPED TO DISPUTE TITLE—EVIDENCE OF LOCATION AND ASSESSMENT WORK.—Where grantors seek to recover the consideration for the transfer of unpatented mining claims a defendant holding under them, with knowledge of their title, cannot dispute it and such grantors need not show that they had complied with the mining laws in the matter of location of claims and annual labor thereon.

2. LIMITATIONS OF ACTIONS—ENFORCEMENT OF TRUST—WHEN ACTION ACCRUES.—Where H. was made trustee of the title to certain mines for the purpose of organizing a corporation and distributing the stock among the owners after disposing of a certain part for working capital, the grantors were entitled to their stock when the company was organized and this stock set apart to this purpose. The statute of limitations does not begin to run in such a case. H. holds this stock in trust for the plaintiffs.

AFFIRMED WITH COSTS, FOR WANT OF PROSECUTION. 154 U. S. 505, 38 L. ED., 1082, 14 Sup. Ct. Rep. 1147.

APPEAL from a Judgment of the District Court of the Second Judicial District in and for the County of Maricopa. W. W. Porter, Judge. Affirmed.

The facts are stated in the opinion.

A. D. Lemon and Street & Goodrich, for Appellant.

In actions for the possession of mining claims, it is well settled that plaintiff must show his location, and strict compliance with the statute in regard thereto, and that the right of possession is in him by virtue thereof. The right to the possession is drawn directly into controversy in this action.

There is no evidence that the working capital had been

disposed of, as is contemplated in this agreement, before the stock should be placed to the credit of plaintiffs on the stock books of the company. But to avoid the results of such omission, the plaintiffs contend that the breach of trust happened when the company was organized, at which time those things were not done which were agreed upon, but things were done in opposition to the terms of the agreement and in violation thereof. If the latter position be correct then the plaintiff's action is barred by the statute of limitations.

A. D. Duff, for Appellee.

It is said that we failed to prove title to the mining property. Defendants are not in position to question our title, nor were we required to show any title. They derive all their title from us: they took possession and yet hold it under our deeds claiming it as their own property.

A purchaser when sued for failure to comply with his contract can no more question the title of his vendor, while in possession under the title derived from him, than a tenant can dispute the title of his landlord while holding under him. In fact vendor and vendee on this subject stand in the same relation as landlord and tenant. *Galloway* v. *Finley,* 12 Pet. 264-295; Bigelow on Estoppel, p. 414. The vendee *must* first surrender possession of the property to the vendor, or be lawfully ejected by a paramount title before he can call in question the vendor's title. And when the subject matter of sale and controversy is a possessory right only, as in this case, there is more reason for the rule than even where the fee is involved.

This is an action to enforce an express trust and limitation laws do not bar such trusts. Angel on Limitations, Secs. 166 and 468; Perry on Trusts, Secs. 860, 861; *Seymore* v. *Freer,* 8 Wall. 202; *Lewis* v. *Hawkins,* 23 Wall. 126. Hickies was the trustee, he was also president and head officer of the corporation when he made the deed. Therefore this corporation took the title to this property with full knowledge of this trust, and is bound to execute said trust. Wade on

Notice, Sec. 57, 58, 59; Perry on Trusts, Sec. 836. No demand was necessary in this case, more than a reasonable time had elapsed in which to issue and deliver the stock. Parsons on Cont. Star p. 535. And what is a reasonable time is a question of law for the court. Ib.

But in equity no demand is necessary before bringing an action for specific performance, such demand does not as at law give the right of action, but is important only as relates to costs. *Bruce* v. *Tilson,* 25 N. Y. 194; *Wellant* v. *Huber,* 8 Nev. 209; Bispham's Eq., Sec. 392.

BARNES, J.—This is an appeal from the district court of the Second judicial district of Arizona in and for the county of Maricopa. The facts of the case are about these: Philes owned four certain mining claims, and a mill-site near them. He and Thomas H. Blair each owned an undivided one-half of another; and he, Blair, and Polhemus each owned an undivided third of another. These mining claims all lay, in a group adjoining each other, in the Cave Creek mining district aforesaid. Plaintiffs conveyed all their interests in these six mining claims to William W. Hickies, one of the defendants in this action, and Philes also conveyed to him the mill-site; and, to save the expense of several deeds, they all joined in the same deed, conveying all their rights in the property, without specifying their respective interests therein. At the same time, and as a part of the same transaction, all the parties executed another instrument, in which Hickies is styled "party of the first part," and the plaintiffs "party of the second part," by which it is agreed that said mining property was conveyed by plaintiffs to said Hickies in trust for him to organize a joint-stock company to work, operate, and develop said mines; that said company should be called the "Ithaca Consolidated Gold & Silver Mill and Mining Company," and, when organized, Hickies would issue and deliver to the plaintiffs, and place to their credit on the stock-books of the company as unassessable stock, an amount of stock not to exceed three-fifths of the capital stock of the company, and that the fulfillment of these promises by Hickies in this

respect was the real consideration for which said deeds were made; that 20,000 shares for each mine, or 120,000 in the aggregate, should be set aside as a working capital to defray expenses, etc., and the stock to which plaintiffs were entitled should not exceed three-fifths of the capital stock which remained after setting aside or deducting this working capital of 120,000 shares. In July, 1881, Hickies organized said company under the laws of California, and, in pursuance of the laws of Arizona, filed the articles of incorporation with the recorder of Maricopa county. The capital stock was fixed at $6,000,000, divided into 600,000 shares, of the par value of $10 each. Of this stock, Hickies, at the same time, subscribed for and took in his own name 584,600 shares. Upon the organization of the company, Hickies was elected president thereof, and has held the office ever since, and is now holding it. In September, 1882, Hickies conveyed all this mining property to the said company,—he, at that time, being president of the company; and the company through him, at once took possession of the property, working and improving the same, and is now in the actual possession thereof, claiming as owner under said deeds. Hickies in the mean time has sold some 25,000 shares of stock; the balance is still in his possession. The plaintiffs have received no stock of said company; and, their rights thereto being denied by defendants, in 1886 they brought this action to compel a specific performance of said agreement, and a complete execution of the trust; and a decree was entered in their favor at the April term of said court, 1887, from which this appeal is now prosecuted.

It is urged that, as these mines were unpatented, the plaintiffs must show that they had complied with the mining laws; that is, that they had made a valid location, and had done the annual work, before they can seek any remedy in this case to enforce the contract of Hickies. We cannot concur in this proposition. As between the contracting parties, grantor and grantee, trustee and *cestui que trust,* and those holding under them, with knowledge of the title of grantor, such title cannot be disputed. *Alexander* v. *Sherman, ante,* p. 326,

16 Pac. 45; *Blake* v. *Thorne, ante,* p. 347, 16 Pac. 270. It is urged that the cause is barred by the statute of limitations. It is clear that the contract in evidence made Hickies the trustee of the title to these mines for the purpose of organizing a corporation, and distributing the stock of such company among the owners, after disposing of a part for working capital. This does not mean that Hickies was to keep all the stock of the company until this stock for working capital had been actually sold. It meant that when the company was organized, and this stock was set apart or was devoted to this purpose, then grantors were to be entitled to their stock. The statute of limitations does not begin to run in such a case. Hickies holds this stock in trust for the plaintiffs. We think the evidence sustains the findings, and see no error in this record. The judgment is affirmed.

[Civil No. 239. Filed June 20, 1888.]

[S. C. 18 Pac. 597.]

JESUS M. PACHECO, Plaintiff and Appellant, v. ROBERT E. WILSON, Defendant and Appellee.

1. SUIT TO QUIET TITLE—WHO MAY MAINTAIN—ADVERSE POSSESSION UNDER COLOR OF TITLE—HOLDING UNDER WILL—WHEN STATUTE COMMENCES TO RUN.—An action to quiet title may be maintained by one in adverse possession, under claim and color of title, even though his title be equitable and not at law, and a legal title less than a fee. Where plaintiff claims title by possession and shows that he holds as the heir of his mother who claimed under the will of her husband who died in possession in 1873 more than eleven years before, he is entitled to judgment, the statute of limitations commencing to run from the date of the mother's possession under the will.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Wm. H. Barnes, Judge. Reversed.

The facts are stated in the opinion.

Hereford and Lovell, for Appellant.

Under our statute, as it existed prior to the adoption of the revised statutes, and even since, *five years'* adverse possession of land gives title even against a paper title. Statute of Limitations, Chap. XXXV, Sec. 4, Compiled Laws, 1877. Also Chap. XXXV, Sec. 9, 10 and 12.

Our Statutes of Limitations are identical with those of California, and have been fully construed by the courts of that state. "Under our Statutes of Limitations a five years' adverse possession covers all actions, and effectually bars all rights of other claimants as a sixty years' adverse possession under the common law." *Arrington* v. *Liscom,* 34 Cal. 365-385; *Cannon* v. *Stockmon,* 36 Cal. 535-9; *Zeilin* v. *Rogers,* 10 Sawyer, 200, 21 Fed. 103; *Langford* v. *Poppe,* 56 Cal. 73.

The lapse of time limited by such statute not only bars the remedy but extinguishes the right, and vests a perfect title in the adverse holder. *Leffingwell* v. *Warren,* 2 Black, 605.

Congress of the United States, by an act approved Feb. 5, 1875, entitled "An act to grant lands in the Territory of Arizona," and while the personal representatives of Refugio Pacheco were in possession, recognized their claim to the premises. Supplement to the Rev. St. U. S. p. 126. Mere adverse possession without color of title is sufficient, but even if color of title were necessary, the will of Refugio Pacheco constitutes such color. 2 Blackstone, Chap. XXII.

"An action may be brought by any person against another who claims an estate or interest adverse to him for the purpose of determining such adverse claim." Statutes 1881, p. 116.

It is not necessary under our statute that the plaintiff, in an action to quiet title, show a legal title if he show the better right. *Merced Mining Co.* v. *Fremont,* 7 Cal. 319, 68 Am. Dec. 262. Complaint need not aver ownership of plaintiff in fee, under Sec. 738 of Civil Procedure of California. *Stoddart* v. *Burge,* 53 Cal. 395; *Rough* v. *Simmons,* 65 Cal. 227; *Pierce* v. *Fetler,* 53 Cal. 18; *Calderwood* v. *Brooks,* 45 Cal. 519.

Appellant established upon the trial his possession of the

premises, which without any other title, was sufficient to maintain the action. *Sepulveda* v. *Sepulveda,* 39 Cal. 18; *Coleman* v. *San Rafael etc. Co.,* 49 Cal. 521.

An action to quiet title will lie, although the legal title is in the United States, if the plaintiff had the better right. *Wilson* v. *Madison,* 55 Cal. 5; *Orr* v. *Stewart,* 67 Cal. 275; *Brandt* v. *Wheaton,* 52 Cal. 430.

As against a mere trespasser, one in possession of public land will be presumed to be the owner. *Brandt* v. *Wheaton, supra.*

The defendant failed to show either possession or title. "The title was purely a possessory one, and the plaintiff having proved possession of the mining ground, made out all the title required by law to entitle it to the relief demanded." *Niagara Mining Co.* v. *Bunker Hill Min. Co.,* 59 Cal. 613.

Ben Goodrich, for Respondent.

The supreme court of the United States in *Holland* v. *Challen,* 110 U. S. 25, 3 Sup. Ct. Rep. 495, in speaking of the requisites to plaintiff's right of recovery in this class of cases, lays down this broad proposition: "Undoubtedly as a foundation for the relief sought, the plaintiff (appellant) must show that he has a legal title to the premises in question;" and this doctrine is re-examined and re-affirmed by the same court in *Frost* v. *Spitley,* 121 U. S. 557, 7 Sup. Ct. Rep. 1129. Both of these cases involved the construction of a statute similar in substance to the statute under which the present case was tried. Having failed to show a legal title, appellant must, under the authorities above cited, fail in this case. Whatever the rule may be in California the courts here are bound to follow the decisions of the supreme court of the United States. *Belcher* v. *Chambers,* 53 Cal. 642.

WRIGHT, C. J.—This was a complaint by the plaintiff, in which he alleges that he is the owner of, and in possession of, certain lands described, and seeks to quiet his title against a claim of defendant. On the trial he offered no paper title. He showed that, in 1869, one Herran and wife occupied the

premises. That, in September, Refugio Pacheco went into possession of said premises, and he died in September, 1873, leaving him surviving his widow, Paula, who was made executrix, and five children, Nabor, Manuel, Refugio, Jesus Mateo, and plaintiff. That he bequeathed all his property to his wife, and this property was described as the "Field Las Pelas." His wife took possession of the premises, and occupied the same until her death, December 12, 1884. That at her death she was executrix aforesaid, and the estate remained unsettled. After her death, Mateo and Nabor were appointed administrators of her estate, and with will annexed of the estate of Refugio aforesaid, and through them both estates were in process of administration. Said Mateo, administrator, leased said premises to one Lee Ding, who paid rent to the administrators, $140 per annum. The probate court, by decree of partition, set these premises apart to plaintiff as his part of the estate, as heir of his father and his mother; and Sotero Ruelas was appointed his guardian; and said guardian executed a lease of the premises to Lee Ding for a term of years, at an annual rental of $140 per annum, who accounted to said guardian, and continued to occupy under said premises under said lease.

The possession of Lee Ding, as tenant of plaintiff's guardian, which continued until after plaintiff's majority, was the possession of plaintiff, who claimed as heir of his mother, who claimed under the will of her husband. This is a claim and color of title, and such a possession is an adverse possession, and was sufficient to sustain a complaint to quiet title, and is within the authority of *Frost* v. *Spitley,* 121 U. S. 552, 7 Sup. Ct. Rep. 1129, and the cases there cited. A person in possession adverse, and under a claim and color of title, may maintain this action, even though his title be equitable and not at law, and a legal title less than a fee. The court below, therefore, crred in dismissing this bill of complaint. The plaintiff made out a case which called upon the defendant to show his title. The title of defendant was a deed from Nabor to defendant, and a deed from Herran in 1882. The devisee of Refugio had held adversely under color of title from

1873, under his will; hence limitations began to run from that date, and made good the title to those claiming under Refugio. The title of plaintiff in the premises should be quieted, and a decree rendered accordingly. The cause is reversed and remanded.

Barnes and Porter, JJ., concur.

[Civil No. 220. July 30, 1888.]

[S. C. 19 Pac. 4.]

THE UNITED STATES OF AMERICA, Plaintiff and Appellant, v. HENRY L. HART, et al., Defendants and Appellees.

1. SET-OFF AND COUNTERCLAIM—SUITS BY UNITED STATES—REV. ST. U. S. 1878, SEC. 951, CONSTRUED—EVIDENCE.—In a suit by the United States against an individual under Sec. 951, *supra*, a claim for credit, submitted to the accounting officers of the treasury and disallowed in whole or in part may be pleaded as a counterclaim. Under this section legal evidence to prove the claims is admissible. By Sec. 886, Rev. St. U. S. 1878, authenticated transcripts are properly received as evidence.

2. SAME—SAME—WHAT CONSTITUTES PROPER SET-OFF—REJECTION OF CLAIM—ACCOUNTING OFFICERS—ACTION OF BUT PRIMA FACIE EVIDENCE.—The purchase of supplies by order of the commissioners of Indian Affairs and the performance of certain services and the incurring of certain expenses, all in a proper account, with vouchers presented to and rejected in whole or in part by the proper accounting officers, is a proper set-off in a suit by the government. The action of the accounting officers is only *prima facie* evidence, and not final.

APPEAL from a Judgment of the District Court of the First Judicial District in and for the County of Pima. Wm. H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

Owen T. Rouse, U. S. District Attorney, for the United States.

Haynes, Jeffords & Franklin, and Hereford & Lovell, for Appellees.

WRIGHT, C. J.—This suit was brought to recover from the defendants the sum of $4,016.02, the amount found due the government from the defendant Henry L. Hart, as Indian agent at San Carlos, upon the adjustment of his accounts by the proper officers of the treasury department. The other defendants are the sureties on his official bond. The complaint seems to have been in the usual form. The answer, after a general denial, alleges in its third count, as a set-off against the demand of plaintiff, certain credits claimed to be due from the government to said defendant Hart, as such Indian agent, the vouchers for which credits had been duly presented to the proper accounting officers of the treasury department, and by them disallowed in whole or in part. The plaintiff demurred to this count of defendant's answer, and for grounds of demurrer alleged "(1) that the allegations are not sufficient to constitute a defense; (2) that the statements in said count do not constitute an offset; (3) that said count is indefinite and uncertain; (4) that it does not state facts sufficient to constitute a defense." The court overruled the demurrer, and admitted evidence to prove these credits, which had been so disallowed in whole or in part, were just, and should be allowed against the claim of the government. To the action of the court in overruling the demurrer, and in admitting evidence touching these rejected vouchers, the plaintiff duly excepted, and, alleging that this was error on the part of the *nisi prius* judge, relies upon these grounds for reversal of the judgment.

It is difficult to see upon what theory the position of the learned counsel for the plaintiff is tenable. In the light of chapter 20 of the act of March 3, 1797 (see section 951, Rev. St. U. S.,) and the repeated decisions of the United States supreme court relating thereto, it would seem that this was no

longer an open question. The first part of said section reads as follows: "In suits brought by the United States against individuals, no claim for a credit shall be admitted upon trial, except such as appears to have been submitted to the accounting officers of the treasury for their examination, and to have been by them disallowed in whole or in part." No question is raised as to the truth of the averments in defendant's answer, and the credits in question were claimed to be due from the government to the defendant Hart, the vouchers for which had been presented to the proper accounting officers of the treasury, and had been by them disallowed in whole or in part. If this were so, were not these claims, thus rejected in whole or in part by said accounting officers, admissible in evidence on the trial below, by virtue of the provisions of said section 951 of the United States Revised Statutes? And, if they were thus admissible, does it not logically and legally follow that legal evidence tending to prove that they were just and equitable was also admissible? To say that the claim itself was admissible by virtue of section 951, but that evidence to establish the claim was not admissible, would be absurd. What congress meant was simply that no evidence to prove a claim for credit should be admitted at the trial, in suits between the government and individuals, unless it first be shown that such claim had been duly presented to the proper accounting officers of the treasury department, and has been by them in whole or in part disallowed. That was the case here. But the learned counsel for plaintiff claims that the vouchers themselves should have been introduced. That was unnecessary, as by section 866 of the United States Revised Statutes it is provided that a transcript of the books and proceedings of the treasury department, when properly authenticated, shall be admissible in evidence, that properly authenticated copies of all papers, etc., should have the same force and effect as the originals would have; the intention of congress being manifest to do away with the trouble, risk, and expense of procuring the originals, by making duly authenticated transcripts and copies thereof equal in dignity and import to the originals themselves. The

admission of the transcript from the treasury department, duly authenticated, showing that the vouchers for the claims set up by Hart had been presented to the proper accounting officers, and disallowed, we think was sufficient to authorize evidence to establish them.

It is claimed, however, that the matters set up in the answer do not constitute a set-off. It was alleged in the answer that the defendant Hart had bought certain supplies by order of the commissioner of Indian affairs; that by order of the same officer, he had bought certain cattle at a certain cost, and other supplies, and that he had performed certain services, and incurred certain expenses; and all, in a proper account, with the vouchers for each item, had been presented to the proper accounting officers, and rejected in whole or in part. We think this did constitute a set-off. In the case of *U. S.* v. *Wilkins*, 6 Wheat. 136, Mr. Justice Story says: "There being no limitation as to the nature and origin of the claim for credit which may be set up in this suit, we think it is a reasonable construction of the act [act March 3, 1797, see *supra*,] that it intended to allow the defendant the full benefit, at the trial, of any credit, whether arising out of the particular transaction for which he was sued, or out of any distinct and independent transaction which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States." The object of the act seems to be to liquidate and adjust all accounts between the parties, and require a judgment for such sum only as the defendant, in equity and justice, should be proved to owe to the United States. Now, it is true that set-off did not exist at common law, and that it had its origin in St. 2 Geo. II.; but always after that act mutual debts and claims between plaintiff and defendant could be set-off, the one against the other, and the only limitation to the right of set-off in suits between the government and individuals, in this country, is that the claims of the individual must be first duly presented to the proper accounting officers of the treasury department, and by them in whole or in part disallowed. The rulings of the supreme court of the United States have been uniformly in accord-

ance with this view. In the case of *Watkins* v. *U. S.*, 9 Wall. 759, a case relied on by the learned counsel for plaintiff, Mr. Justice Clifford says: "Whether the claim is a legal or equitable claim, if it has been duly presented to the accounting officers, and has been by them disallowed, it is the proper subject of set-off under that act; but it cannot be adjudicated in a federal court unless it has been presented and disallowed. The rejection of such claim by the accounting officers constitutes no objection to it as a claim for set-off." It is to be observed that "questions of set-off in the federal courts arise exclusively under the acts of congress, and no local law or usage can have any influence in their determination." Thus we see the action of the accounting officers is not final and conclusive, at least so far as the defendant is concerned. Is this not in harmony with the just and liberal spirit of our free institutions? It is fair to presume that the citizen is not present when the accounting officers pass upon his claim for credit. No one can imagine those officers to be less than fair and impartial. But they cannot know the peculiar circumstances that often surround the officer whose accounts they adjust; neither can they often know fully all the facts upon which these accounts are based. Therefore to hold that the action of these accounting officers is final and conclusive upon the defendant would often be to deprive him of most essential rights, and to withhold from him that measure of equity and fairness which a just government always yields to its citizens. Hence the action of these accounting officers is at most only *prima facie* evidence, and not final and ultimate. See *U. S.* v. *Gaussen,* 19 Wall. 198; *U. S.* v. *Eckford,* 6 Wall. 484; *U. S.* v. *Wilkins,* 6 Wheat. 138; *Watkins* v. *U. S.,* 9 Wall. 759; *Bruce* v. *U. S.,* 17 How. 437; *U. S.* v. *Jones,* 8 Pet. 384. In the latter case, Mr. Justice McLean, speaking for the supreme court of the United States, said: "The accounting officers of the treasury department act upon these accounts, and give the credits, as entered, their official sanction. The vouchers of an individual are all submitted to these officers, and their decision has always been considered as conclusive upon the government, but not

so as against the individual." We do not think the court below erred in its rulings. It is therefore ordered that its judgment be affirmed.

Porter and Barnes, JJ., concur.

[Civil No. 228. Filed July 30, 1888.]

[S. C. 19 Pac. 6.]

FRANK ELY, Plaintiff and Appellant, v. THE NEW MEXICO AND ARIZONA RAILROAD COMPANY, Defendant and Appellee.

1. SUIT TO QUIET TITLE—PLEADINGS—GOVERNED BY CHANCERY RULES—LAWS 1881, p. 116, SEC. 1, CONSTRUED.—Where a complaint in a suit to quiet title fails to allege possession or right to possession in plaintiff it is subject to general demurrer, unless it alleges the inadequacy of remedies at law or other grounds for equitable relief. Being a bill in equity it is governed by the rules of chancery pleading. The statute of 1881 enlarged the remedies of the owner of the true title by enabling him to apply for equitable relief even when out of possession, but he must bring himself within the rules of chancery pleading.

REVERSED 129 U. S. 291-294, 32 L. ED. 688, 9 Sup. Ct. Rep. 293.

APPEAL from a Judgment of the District Court of the First Judicial District in and for the County of Pima. Wm. H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

Jeffords and Franklin, and Rochester Ford, for Appellant.

Under Compiled Laws of Arizona, Sec. 256, pp. 449, so far modified the old equity rule, that but three things were necessary to concur in the plaintiff. First: title. Second: possession. Third: the assertion of an adverse claim on the part of the defendant. *Curtis* v. *Sutter*, 15 Cal. 259; *Merced Min. Co.* v. *Fremont*, 7 Cal. 319, 68 Am. Dec. 262.

In 1881 the statute was amended to read as follows: "An action may be brought by one against another who claims an estate or interest in said real property adverse to him, for the purpose of determining such adverse claim." Laws of Arizona, 1881, p. 116, Sec. 1. The obvious intention of this amendment was to permit any person, claiming an interest or estate in land, whether in or out of possession, to at once bring an action for the purpose of having any claim adverse to his, determined, and the title quieted. The concurrence of but two facts are necessary to warrant the action under the statute as amended; First, the claim of an estate or interest in the real property which is subject of controversy; Second, that another person should make or assert some claim to said real property, adverse to him. That being so the plaintiff was bound only to allege his estate or interest in the land, the adverse claim of defendants, and to pray that said adverse claim be determined. Compiled Laws of Arizona, Sec. 39, pp. 414 and 415.

The authorities are uniform and conclusive that a complaint such as the one in this action, states a cause of action, and the demurrers should have been overruled. *Statham* v. *Dusey,* 11 Pac. (Cal.) 606; *Stoddard* v. *Burge,* 53 Cal. 394; *Pierce* v. *Felter,* 53 Cal. 18; *Rough* v. *Simmons,* 3 Pac. (Cal.) 91; *Rough* v. *Booth,* 3 Pac. (Cal.) 805; *Garvey* v. *Willis,* 50 Cal. 619; *Goldsmith* v. *Gilliland,* 10 Sawy. 606, 22 Fed. 865; *Marot* v. *The Germania etc. Association,* 54 Ind. 37; *The Jeffesonville etc. R. R. Co.* v. *Oyler,* 60 Ind. 383; *Holland* v. *Challen,* 110 U. S. 15; *Reynolds* v. *Crawfordsville Bank,* 112 U. S. 405; *Clark* v. *Smith,* 13 Pet. 195.

Haynes & Mitchell, for Respondents.

Unless the complaint alleges that the plaintiff is in possession, it must set forth the particulars of the plaintiff's title. The statute in question lays down no rule of pleading. The complaint must show that the plaintiff has no remedy other than that to be obtained from a court of equity. 3 Pom. Eq. Sec. 1399.

WRIGHT, C. J.—This was a suit in equity to quiet title. The complaint alleges that the plaintiff is the owner in fee of all the land described in the complaint, but does not allege that he is in possession; nor does it aver that he is entitled to possession, or ask that possession be awarded him. The land is described as a Mexican land grant, called the "Rancho San Jose de Sonoita," and situated in the Sonoita valley, county of Pima, territory of Arizona, and that it was granted by the Mexican authorities to one Leon Herreras on the 15th day of May, 1825. The complaint further describes the land according to the calls of a survey made by the government of Spain on the 26th and 27th of June, 1821. Then, after averring that the claim of the defendants, and each of them, is without any right whatsoever, the complaint closes with the following prayer for relief: "(1) That the said defendants, and each of them, be required to set forth the nature of his claim, and that all adverse claims of the defendants, and each of them, may be determined by a decree of this court; (2) that by said decree it be declared and adjudged that the defendants have no estate or interest whatever in or to said land and premises, or in or to any part thereof, and that the title of plaintiff is good and valid; (3) that the defendants, and each of them, be forever enjoined and debarred from asserting any claim whatever in or to said land and premises, or to any part thereof, adverse to plaintiff; and for such other and further relief as to this honorable court shall seem meet and agreeable to equity, and for his costs of suit." The principal defendants demurred to this complaint, alleging as grounds of demurrer "(1) that the court had no jurisdiction of the subject-matter of the action; (2) that there is a defect of parties defendant, in that it is not alleged that defendants claim a joint interest in the premises referred to in the complaint, or any part thereof; (3) that said complaint does not state facts sufficient to constitute a cause of action." On the latter cause of demurrer the court sustained the pleading; and the plaintiff electing to stand on his complaint, and refusing to amend the same, the court dismissed the action. From this

order and judgment of the court the plaintiff appealed; and the principal question to be considered here is, was the action of the court below, in sustaining the demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action, erroneous? This question should be answered by the rule of chancery pleading; for, be it remembered, this was a bill in equity. We again observe, in the outset, that this bill nowhere alleges possession, or even the right of possession, in the plaintiff. The irresistible inference therefore is that he is not in possession. It goes without saying that a plaintiff in possession occupies quite a different attitude, in respect to the remedies to which he is entitled, from a plaintiff out of possession. A claimant in possession is *prima facie* the owner, while no such presumption attaches to a claimant out of possession. A plaintiff in possession need only state that fact in his bill, that he is the owner, etc., and that defendant is asserting some sort of adverse claim, to authorize the court of equity to grant such relief as he may be entitled to. But is that all that is necessary where the plaintiff is out of possession?

To state facts sufficient to constitute a cause of action such as will authorize the intervention of a court of chancery, within the rules of chancery pleading, should not the plaintiff out of possession further state facts sufficient to show to the chancellor that the right or estate to be protected is equitable in its nature, or that the remedies at law are inadequate, where the right or estate is legal? Or at least such facts as will authorize such a deduction to be made, and thus authorize and justify chancery interposition? Is it not patent on the face of this bill that, if its allegations are true, the plaintiff has an indubitable legal estate? From aught that appears to the contrary is it not equally apparent that plaintiff has a full, adequate, and complete remedy at law by the action of ejectment? There is no question that the statute of 1881 authorized him to bring the proper suit, whether in or out of possession, though the repeal of that law went into effect about a month after this suit was filed; but, if out of possession, to obtain equitable relief, ought he not, by the aver-

ments of his complaint, to bring himself within the purview of equity jurisdiction? Mr. Pomeroy, in his Equity Jurisprudence, (section 130) says: "In order that a cause may come within the scope of the equity jurisdiction, one of two alternatives is essential; either the primary right, estate, or interest to be maintained, or the violation of which furnishes the cause of action, must be equitable rather than legal; or the remedy granted must be in its nature purely equitable, or, if it be a remedy which may be given by a court of law, it must be one which, under the facts and circumstances of the case, can only be made complete and adequate through the equitable modes of procedure." They who want equity themselves must give it to others. Ought not A. to show his own strength before asking that the weakness of B. be revealed? It will not do to say he shows his strength by asserting his title in fee; for this would indicate his right to a full, but only a legal, remedy. Ought he to be permitted to stand in the forum with closed hands, and demand that B.'s be opened? Will equity allow the aggressor to provoke the conflict, using, forsooth, concealed weapons, and then indicate his adversary's line of defense? While reason is the life of the law, conscience is the vital principle of equity. In fact, equity rules in the realm of conscience; here it had its birth, and here alone it has flourished. It will therefore tolerate no wrong, and submit to no advantage. Ought not the plaintiff in this case to have brought himself clearly, by his complaint, under some head of equitable remedy, and then demanded the appropriate relief. As it stands, does this complaint state facts sufficient to constitute a cause of action in equity? Does it not reveal an unmistakable and adequate remedy at law? And is it not a well-settled rule of equity jurisprudence that where a party, in subserving the interests of a legal estate, has a sure legal remedy, which vouchsaves to him ample and complete relief, he must resort to legal and not equitable tribunals, Now, it is true, the legislature of this territory has contravened the old equity rule that a party must be in possession before he could maintain a peace bill, or an action *quia timet;* and, under the law

as amended in 1881, and which was still in force when this action was brought, any person could bring an action against another claiming adversely, for the purpose of determining such adverse claim. This amendment was an enabling act. It enabled a plaintiff to do what before he could not do,—to bring an action in equity to quiet title to land when he himself was not in possession thereof. But should he not come with such statement of facts as would justify him in invoking the aid of chancery. Will it be contended that this amendment was intended to abolish, and did abolish, the universal rule of equity that, where there is an adequate remedy at law, resort must be had to courts of law, and chancery courts will not interfere? This would certainly be abolishing the distinction between law and equity, thus far at least; and a plaintiff out of possession, but owning the fee, and having the right of possession, and therefore, beyond dispute, having a complete, absolute, and adequate remedy at law, by the action of ejectment, could, nevertheless, go into chancery, and, without stating any of the ultimate facts ordinarily requisite to enable the court to apprehend its equitable functions, maintain his action *quia timet*. This would be an unreasonable construction. Again we ask, had not the plaintiff herein, taking the averments in his complaint to be true, an adequate and complete remedy at law? Let us see. He was out of possession; if entitled to it, ejectment would have awarded him the possession. He wanted the title adjudicated; ejectment would not only have done that completely and fully, but would have allowed his and defendant's titles to have been passed upon by a jury of their peers. The old fictions and fictitious persons used in ancient actions of ejectment have been done away with in this territory, and generally in this country. Those really interested are here made parties plaintiff or defendant. So that a judgment in ejectment is practically as completely *res adjudicata* as in any other class of litigation. Our construction, then, of the statute of 1881, is that it simply enlarged the remedies of the owner of the true title by enabling him to apply for equitable relief even when out of possession, but that it did

not mean that he need not bring himself within the well-settled rules of chancery pleadings. Hence we are of opinion that plaintiff should have brought his action at law, or have given stronger reasons for invoking the aid of a court of equity. See Pom. Eq. Jur., §§ 130, 1399; 1 Daniell, Ch. Pr. *4; *Frost* v. *Spitley,* 121 U. S. 552, 7 Sup. Ct. Rep. 1129; *United States* v. *Wilson,* 118 U. S. 86, 6 Sup. Ct. Rep. 991; *Curtis* v. *Sutter,* 15 Cal. 259, 264; *Van Winkle* v. *Hinckle,* 21 Cal. 342; *King* v. *Carpenter,* 37 Mich. 363; *Moran* v. *Palmer,* 13 Mich. 367; *Ormsby* v. *Barr,* 22 Mich. 80, *Climer* v. *Hovey,* 15 Mich. 18; and *Tabor* v. *Cook,* 15 Mich. 322; *Methodist Church* v. *Clark,* 41 Mich. 730, 3 N. W. 207. See, also, *McGuire* v. *Circuit Judge,* 69 Mich. 593, 37 N. W. 568.

The learned counsel for the appellant has called the especial attention of this court to the case of *Holland* v. *Challen,* 110 U. S. 15, 3 Sup. Ct. Rep. 495,—a suit founded on the Nebraska statute of 1873, a statute similar to the Arizona statute of 1881. Counsel claim that the pleadings in that case were in no material respect different from the pleadings in the present case. But we think different. In that case plaintiff claimed title by virtue of a tax sale,—an appropriate head of equitable cognizance. Prior to the sale defendant had been the owner. There the plaintiff in his bill of complaint, not only alleged that he was the owner of the premises in fee, but he also alleged that he was entitled to the possession thereof, and set forth the origin of his title, particularly specifying the deeds by which it was obtained, etc., and that the claim of defendant so affected plaintiff's title as to render a sale or other disposition of the property impossible; in other words, that defendant's claim was a cloud upon plaintiff's title. But there is this additional marked difference: Judge Field, in delivering the opinion of the court, assigns as the conclusive reason and justification for the intervention of equity the fact that the lands in dispute were unoccupied, wild, and uncultivated, and that, therefore, an action in ejectment would not lie, because there was no occupant; thus clearly intimating that ejectment would

have been the proper remedy if the defendant had been in possession. In the case at bar the defendants are in possession, and therefore the action of ejectment would certainly lie. However, in the case of *Frost* v. *Spitley*, 121 U. S. 552, 7 Sup. Ct. Rep. 1129, in a suit under this identical Nebraska statute of 1873, Mr. Jutice Gray, in delivering the opinion of the court, said: "By reason of that statute a bill in equity to quiet title may be maintained in the circuit court of the United States for the district of Nebraska by a person not in possession, if the controversy is one in which a court of equity alone can afford the relief prayed for." The case of *Clark* v. *Smith*, 13 Pet. 195, is unlike this case also, for the reason that that was a case arising under the Kentucky statute regulating proceedings in courts of chancery. That law required both legal title and possession to be in the plaintiff. The complaint in that case also showed an appropriate subject for equitable adjudication. It asked to have the defendant's patents to the land in controversy, issued years subsequent to the issuing of complainant's ancestor's patents and survey of the same land, set aside, or to compel the defendant to release the title derived thereby. The learned counsel also refer us to the case of *Reynolds* v. *Bank*, 112 U. S. 405, 5 Sup. Ct. Rep. 213; but that was a suit also involving an appropriate head of equity jurisdiction, viz., certain mortgage transactions between the plaintiff, Reynolds, and the bank. The bill, which was a long one, after alleging the execution of the mortgages by the plaintiff to the defendant, further alleged that Reynolds subsequently was declared a bankrupt. Bankruptcy is also an appropriate head of equity. The court below found the equities of the case to be with the defendant and appellees; and Mr. Justice Woods affirmed the decree in equity rendered at *nisi prius*, holding that the averments in the complaint, and the facts adduced at the trial, justified such a decree.

In the case at bar we think there was no error in the ruling of the court below, and therefore its judgment is affirmed.

[Civil No. 224. Filed September 19, 1888.]

[S. C. 19 Pac. 157.]

ATLANTIC & PACIFIC RAILROAD COMPANY, Plaintiff and Appellant, v. J. T. LESUEUR, Defendant and Appellee.

1. RAILROADS—RIGHT OF WAY—14 U. S. ST. AT LARGE, 292—IMPROVEMENTS TAXABLE.—Where the character of a railroad company exempts the right of way within the territories of the United States, statute, *supra*, the exemption is limited by the letter of the law and does not extend to improvements thereon.

2. TAXATION—EXEMPTION STATUTES—CONSTRUCTION.—Exemption from taxation is an exception to the general rule that all property shall be taxed equally and is subject to the strictest construction.

3. RAILROADS—RIGHT OF WAY—EASEMENT—ABANDONMENT.—The grant of a right of way to a railroad is the grant of an easement and not of a fee. Upon abandonment of its line the right of way so abandoned would revert to the grantor.

4. SAME—TAXATION—FRANCHISES—FEDERAL AGENCY—POWER OF TERRITORY TO TAX—ART. 1, SEC. 8, CONST. U. S.; REV. ST. U. S. 1878, SECS. 1850, 1851; COMPILED LAWS ARIZONA 1877, SEC. 2005, CITED.—Under the powers delegated to Congress and the Territories by the constitution and statutes, *supra*, this territory has the right to tax franchises, whether they be Federal agencies or the means of interstate commerce.

5. SAME—SAME—ROLLING STOCK—SITUS.—Where a railroad uses rolling stock in a county such personal property is subject to taxation where used.

6. TELEGRAPH LINES—TAXATION.—Where telegraph lines are built by railroad on a right of way exempted by its grant they are nevertheless taxable.

DISMISSED WITH COSTS, ON MOTION OF APPELLANT. 140 U. S. 669, 35 L. ED. 593, 11 Sup. Ct. Rep. 1015.

APPEAL from a Judgment of the District Court of the Third Judicial District in and for the County of Yavapai. James H. Wright, Judge. Affirmed.

The facts are stated in the opinion.

W. C. Hazledine, and Howard & Sanford, for Appellant.

Baldwin & Baldwin, for Respondent.

BARNES, J.—This was a suit to enjoin the collection of taxes levied upon the property of the plaintiff by the proper revenue officers of Apache county. The ground upon which the injunction is sought is that the assessment was illegal. The levy was made upon the improvements on a certain strip of land in said county, 200 feet wide and 112 miles long, upon the center line of which the railroad of plaintiff is situate; the improvements consisting of culverts, wooden bridges, grading, trestles, rock, earth cuts, and fills; also 265,000 wooden cross-ties, steel and iron rails, fish-plates, bolts, and spikes thereon; also steam-pumps and water-tanks, section-houses, depot buildings, round-house, hotel, coal-chutes, side tracks, blacksmith shops thereon; also 12 cottages, used by employes, 500 feet from the track; the franchise of plaintiff to do business and collect freights and fares, except business with the United States; also a telegraph plant along the said line, also safes and office furniture; also railway supplies, also 15 locomotives, 4 coaches, 2 mail and express cars, 100 box cars, 75 flat cars, 7 caboose cars, 16 living cars, 15 hand cars, coal on hand, and cross-ties.

Against the legality of this assessment it is urged, first, that the superstructure and improvements, buildings, etc., on what is called the "right of way" of the plaintiff is exempted from taxation by its charter. By its charter, (14 U. S. St. at Large, 292,) "the right of way through the public lands is granted to plaintiff for the construction of a railroad and telegraph, to the extent of 100 feet on each side of said road, including necessary grounds for station buildings, shops, switches, turn-tables, and water stations; and the right of way shall be exempt from taxation within the territories of the United States." It is said that this is a grant of an interest in the real estate, taken for a right of way, and that whatever is attached to it becomes a part of the realty,

and, as the right of way is exempt, that the exemption carries with it whatever has become a part of the realty. No one can question that a right of way is an interest in the realty; nor that culverts, bridges, railway switches, depot buildings, etc., thereon, become part of the realty. He who has title to the right of way has title to the superstructure. They would pass by grant, and would be subject to the laws regulating the conveyance of real estate, including the statute of frauds. All this will be conceded. But does it follow that the exemption of the right of way exempts all appurtenances afterwards attached thereto? This is the question. The supreme court of Montana seems to hold that it does, though a careful consideration of the decision will show that this conclusion is *dictum*. *Northern etc. R. R. Co.* v. *Carland*, 5 Mont. 146, 3 Pac. 141. The charter of the Northern Pacific Railroad Company is in the same words as the Atlantic & Pacific Railroad Company's charter. In that case the tax was levied upon an assessment of "twenty miles of railroad and rolling stock." The assessment of 20 miles of railroad did include the right of way, as the argument of that case and the cases cited demonstrate conclusively. And the court rightly held that the assessment was illegal, in that the exempted right of way was included in it. This was all that was before the court, and is all that was really decided. The cases cited do not lead beyond this conclusion. *Appeal of North Beach etc. R. R. Co.*, 32 Cal. 506. This case holds that a right of way is an easement in the land, and that the estate is real property, and may be taxed as such. The opinion is quoted at large in the Montana case. We have never seen the principle here stated doubted. Washb. Easem. 5, says: "An easement always implies an interest in the land. It may be a freehold or a chattel one, according to its duration. It is real property, and it is created by grant." In this it differs from a license. *Rowbotham* v. *Wilson*, 8 El. & Bl. 157; *Ex Parte Coburn*, 1 Cow. 570; *Heaton* v. *Ferris*, 1 Johns. 146; *Wolfe* v. *Frost*, 4 Sand. Ch. 86; *Foster* v. *Browning*, 4 R. I. 51, 67 Am. Dec. 505; *Buckeridge* v. *Ingram*, 2 Ves. Jr. 654; *Binney's Case*, 2 Bland. 145; *Bowman* v. *Wathen*, 2 McLean, 385, Fed. Cas. No. 1740; *Providence*

Gas Co. v. *Thurber,* 2 R. I. 21, 55 Am. Dec. 621; *Albany etc. R. R. Co.* v. *Osborn,* 12 Barb. 225; *Albany etc. R. R. Co.* v. *Canaan,* 16 Barb. 247; *Railroad Co.* v. *Morgan Co.,* 14 Ill. 166, 56 Am. Dec. 497; *Williams* v. *New York Cent. R. R. Co.,* 16 N. Y. 100; *Mahon* v. *New York Cent. R. R. Co.,* 24 N. Y. 658; *Wager* v. *Troy Union R. Co.,* 25 N. Y. 526; *Presbyterian Soc. in Waterloo* v. *Auburn etc. R. R. Co.,* 3 Hill, 569; *People* v. *Cassity,* 46 N. Y. 46; *New Haven* v. *Fair Haven etc. R. R. Co.,* 38 Conn. 422, 9 Am. Rep. 399; *Chicago* v. *Baer,* 41 Ill. 306; *Farmers' Loan & Trust Co.* v. *Hendrickson,* 25 Barb. 494; 1 Washb. Real Prop. 3. These, and many other authorities that may be cited, clearly point out the law as stated. An assessment of 20 miles of railroad was an assessment of the real estate, and included the right of way and the superstructure thereon. How we are to conclude from these premises, however, that the exemption of a right of way *ex vi termini* exempts from taxation the superstructure, we cannot see. It is *non sequitur.* Exemption from taxation is an exception from the general rule that all property shall be taxed equally. He who asserts that his property is exempt must show it by the clear letter of the law. No intendments are in his favor. No construction will aid him. Every doubt will be resolved against him. He does not stand favored, as does a grantee or a mortgagee. The meaning of words is not broadened to include him. Though you will construe liberally when you tax, you must construe strictly to exempt. You must point it out in the words, "*Ita lex scripta est;*" free from doubt or ambiguity. Cooley, Tax'n, 204; *Philadelphia etc. R. R. Co.* v. *Maryland,* 10 How. 376; *Providence Bank* v. *Billings,* 4 Pet. 514; *Railroad Co.* v. *Dennis,* 116 U. S. 665, 6 Sup. Ct. Rep. 625; *Cottle* v. *Spitzer,* 65 Cal. 459, 52 Am. Rep. 305, 4 Pac. 435; *Waller* v. *Hughes, ante,* p. 114, 11 Pac. 122. SHIELDS, J., for this court, says: "No property within the territory is exempt from the operation of these revenue laws, unless put beyond them, designedly and unequivocally, by the legislative or other sovereign power. A mere inference that certain property is exempt from taxation will never do; nor will it be assumed, unless the language used is too clear

to admit of doubt." *Railroad Co.* v. *Guffey,* 120 U. S. 569, 7 Sup. Ct. Rep. 693; "It is the settled doctrine of this court that an immunity from taxation by the state will not be recognized, unless granted in terms too plain to be mistaken." By this rule, then, we come to a construction of section 2 of the plaintiff's charter. The lands of plaintiff are not assessed; nor is the right of way as such. Improvements, culverts, bridges, ties, iron, buildings, etc., located on the right of way, are. But were these exempted by the exemption of the right of way? Had congress so intended, it would have been easy to have said so; the addition of a word or two would have made it certain. Congress granted a right of way over the public lands, and in the same section it exempts what is granted from taxation. It did not want improvements, culverts, bridges, buildings, iron, ties, etc. This was property to be placed there afterwards by the grantees. Shall we infer that it exempted what it did not grant, when it does not say so or use words looking in that direction? We think not. We should stand by the letter of the law, in favor of equality of taxation. We will not infer that congress has done so unjust a thing as to expose an immense property thereafter to be created where it would demand the constant protection of all the machinery of organized society at a great expense, and then relieve it of its just burden of taxation in order to defray these expenses. It was projected into almost a wilderness, where inhabitants were few; where the title to the lands was in the United States, free from taxation; where the burdens of sustaining social order would at best be heavy. Such a property as this would greatly increase these burdens. It cannot be thought for a moment that congress intended by the use of the innocent words, "and the right of way shall be exempt from taxation," to do such a monstrous wrong as to exempt the millions the grantees should put upon the right of way from taxation for all time.

It is further urged with great force, skill, and ability that the grant of right of way to a railway is *sui generis,* and is in fact a grant of the fee; and, if so, to exempt the fee so granted exempts the superstructure. It is said that the term "right

of way'' is used to describe the land granted,—that is, that these are words of description, rather than of tenure. We cannot concur with this view, and no authority can be found which so holds. We must conclude that the words are used in their common, well-known, and universally accepted legal meaning, and that it was a grant of an easement as defined by the law. It was not a grant of the fee. Should the company see fit to change its line and abandon its present alignment at any point, the right of way so abandoned would revert to the grantor.

Again, it is urged that the assessment of the franchise of this company is the taxing of a federal agency, and hence it may not be taxed; and in the case of *Steamship Co.* v. *Pennsylvania,* 122 U. S. 326, 7 Sup. Ct. Rep. 1118, is cited. That case and the authorities cited therein hold that the state may not tax a federal agency created by act of congress, and also that a state may not, by taxation, interfere with interstate commerce. This is a power specially delegated by the constitution. "Congress alone can deal with such transportation; its non-acting being equivalent to a declaration that it shall remain free from burdens imposed by state legislation." BRADLEY J., in case *supra. California* v. *Railroad Co.,* 127 U. S. 41, 8 Sup. Ct. Rep. 1073. In the case at bar congress has acted. The act says this right of way shall be exempt from taxation. *Inclusio unius, exclusio alterius.* Congress excludes or exempts only the right of way; hence the inference is that all else is not excluded or exempted. The constitution declares that "congress shall have power to regulate commerce with the foreign nations and among the several states," etc. Article 1, § 8. This takes the power from the states, and delegates it to Congress. Congress might, therefore, tax or authorize the taxation of the franchises of interstate carriers. But the act of the territory is the act of congress. Rev. St. U. S. § 1851. "The legislative power of this territory extends to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. No tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher

than the lands or property of residents." This is the only limitation placed upon the taxing power of the territory, and should be held to be a delegation by congress of its admitted power to the territories to tax all else. A franchise is property, has value, and it is not prohibited to tax it. To do so is not inconsistent with the constitution or laws of the United States. Section 1850, Rev. St. U. S., enacts that "all laws passed by the legislative assembly shall be submitted to congress, and if disapproved, shall be null and void." And may we not add, "otherwise shall have full force and effect?" February 12, 1875, the territory enacted (Comp. Laws, § 2005) that "all property of every kind and nature whatsoever within this territory shall be subject to taxation, except," and a franchise of a corporation is not in any of the exceptions. We must conclude, therefore, that congress has granted to the territory the right to tax franchises, whether they be federal agencies or the means of interstate commerce. Congress may withdraw this power whenever it sees fit, and may disapprove of this legislation. Until it does so, it must be enforced, as the law of the territory. Congress will carefully guard all of its agencies, and see to it that the territories do not impair their efficiency, and also will look well after the commerce among the states, that it be not obstructed, and will act when occasion requires. Until it does, it must be regarded as having approved of this legislation.

Again, it is contended that all of this rolling stock has its *situs* and domicile in Albuquerque, N. M., and was not subject to taxation within said county. It appears that the headquarters of the western division of plaintiff's railroad was at Albuquerque, N. M., and that it had over 1,000 cars and engines in constant use between Albuquerque, N. M., and Mojave, Cal., a distance of over 800 miles, moving passengers and freight. Plaintiff returned 15 locomotives, 16 office cars, and 7 caboose cars as constantly in Apache county; 181 cars were added by the assessor. This question is set at rest by the supreme court of the United States in *Marye* v. *Railroad Co.*, 127 U. S. 117, 8 Sup. Ct. Rep. 1037, (April 28, 1888): "It is quite true, as the *situs* of the Baltimore & Ohio Company is in

the state of Maryland, that, also, upon general principles, is the *situs* of all its personal property; but for the purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the same may be brought and used by its owner, by the law of the place where it is found." And such a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used."

In the above case the *situs* was conceded to be in Maryland. That state granted its charter. In this case, it is by no means conceded that the place of the "head-quarters of the western division" is the *situs* of the company. The charter designates no place of general business. For the purposes of taxation, its *situs* must be whereever business is done, and its personal property engaged in that business shall be subject to the taxing laws of the place where it is so used. The above decision makes it unnecessary to review the long list of cases cited, as this, the last case, settles all conflict and resolves all doubt.

It is insisted, also, that the telegraph lines erected on the right of way are exempt, for the same reasons as depots, etc. We think not, for the reasons given heretofore. It is clear that section 3, c. 53, Comp. Laws Ariz., refers to telegraph lines constructed under the provisions of that act. The lines of this plaintiff are constructed by authority of the act of congress granting its charter. Under what circumstances a court of equity will entertain jurisdiction to enjoin the collection of a tax, see the case of *Campbell* v. *Bashford, ante,* p. 344, 16 Pac. 269, where the question is discussed by this court. We see no error in this record, and the judgment of the district court is affirmed.

Wright, C. J., and Porter, J., concur.

[Civil No. 241. Filed October 2, 1888.]

[S. C. 19 Pac. 225.]

RICHARD STARR, Plaintiff and Appellee, v. T. L. STILES, Assignee, Defendant and Appellant.

1. BANKS AND BANKING—SUCCESSORS IN BUSINESS—ESTOPPEL—DEPOSITORS.—Where one banking firm has succeeded another, paying and collecting the accounts of its predecessor, assuming its obligations, taking and continuing to use its books until the necessities of the business required a new set, it is estopped to deny its indebtedness to a depositor with the old firm who acquiesced in the change of firms, permitted his funds to remain with the new firm, and was treated by the successor as its depositor.

2. JOINT DEBTORS—RELEASE—REV. ST. ARIZ. 1887, SEC. 133, CITED.—A release of the former firm by the depositor does not operate as a release of the latter upon the principle that the release of one joint debtor is a release of all. Statute, *supra*, repeals this doctrine and enacts that the release of one joint debtor does not release the other. The contracts of each firm were separate obligations.

3. LIMITATIONS OF ACTIONS—DEPOSITS IN BANK—STATUTE RUNS FROM DEMAND.—When a bank holds the funds of a depositor subject to call at any time, the contract is to pay on demand, and the statute of limitations does not begin to run until demand.

APPEAL from a judgment of the District Court of the First Judicial District in and for the County of Pima. Wm. H. Barnes, Judge. Affirmed.

The facts are stated in the opinion.

John Haynes, J. A. Anderson, and Stiles & Hereford, for Appellant.

Edwards had two contracts: one with Safford, Hudson and Co., composed of Safford, Hudson, Toole and Wasson, to pay him, on demand, $1132.50; and a second one, with S., H. & Co., composed of Safford, Hudson, Toole and Vosburg, to pay him $3250. Each firm was his simple contract debtor

to the amount of his deposit with it. Matter of the Franklin Bank, 1 Paige's Ch. 249, 19 Am. Dec. 413, and notes, 418.

To make the second firm liable to Edwards for the $1132.50 it must have assumed the payment of the debt, and he must have assented to the assumption, and have discharged the first firm. Parsons on Contracts, Vol. 1, p. 217, title, Novation; Addison on Contracts, Vol. 1, sec. 372; Parsons on Partnership, sec. 328-9; *Nat. Bank* v. *Grand Lodge,* 98 U. S. 123; *Ayers* v. *Gallup,* 44 Mich. 13, 5 N. W. 1072; *Austin* v. *Seligman,* 18 Fed 519, Notes by Wharton.

Likewise at each successive change of firms the same thing must have occurred. Mere passive inaction on his part, in either instance, was not sufficient to terminate the old contract and inaugurate a new one with the new firm. See citations from Parsons and Addison, *supra.*

The allegations of the defendant's second defense, contained in the answer was new matter, which remained undenied, and should have been held to be a bar to the action, upon the well known principle that the discharge of one joint debtor discharges all of them. Parsons on Cont. Vol. 1, p. 26; Addison on Cont. Vol. 1, sec. 365.

Jeffords & Franklin, for Appellee.

BARNES, J.—This is an action in which the appellee brought suit against appellant, as assignee of the insolvent firm of Hudson & Co., bankers, to have his claim for $4,382.50 allowed against the estate of Hudson & Co., and also to recover from the assignee 30 per cent., in dividends; appellee alleging that appellant, as assignee of said estate, had declared three dividends, aggregating 30 per cent., on the indebtedness of Hudson & Co., and that said assignee has paid no dividend or sum whatsoever to appellee on his claim. Appellant admitted that D. J. Edwards had deposited with Safford, Hudson & Co., a firm composed of A. P. K. Safford, Charles Hudson, James H. Toole, and John Wasson, between August 14, 1879, and January 1, 1880, $1132.50, and with the firm of Safford, Hudson & Co., composed of said Safford, Hudson,

Toole and J. S. Vosburg, between January 1, 1880, and March 26, 1880, the further sum of $3250, and that no more than $310 and $230 had been drawn from said firm of Safford, Hudson & Co. The evidence shows that the various banking firms of Safford, Hudson & Co. succeeded each other, and that the firm of Hudson & Co. succeeded the last firm of Safford, Hudson & Co.;that each firm paid and collected the accounts of its predecessor as though no change had been made, and the check-books issued by Hudson & Co. stated that they were the successors to Safford, Hudson & Co. It appears, also, that each firm assumed the obligations of their predecessors. The ledgers of Safford, Hudson & Co., show the original account with Edwards, and its transfer through successive ledgers to the last one used by Hudson & Co., at the time of their failure; and it was agreed that as each of the successive firms was organized, it took and continued to use the books of the former firm until the necessities of the business required a new set, when all accounts not theretofore closed were transferred to a new book. Appellant testified that the account of Edwards was not paid, and on the books of Hudson & Co. it was charged against said firm as one of its debts. Appellant admitted that if Edwards were present, he would testify that "he had made the deposits, and knew of the various changes in said banking firms at the time the same were made, and, knowing that each of said firms had received all the property, assets, and deposits of its immediate predecessor, assumed all the liabilities thereof, and, believing each firm as it succeeded the other to be responsible and liable to him, and intending to continue each of the said successive firms as his bankers, he continued to leave his deposits and money with the new firms, respectively, after they had succeeded the old firms, as set forth in the complaint. The court adjudged that the plaintiff had a valid claim against the estate of Hudson & Co. for $3,072.50, and rendered judgment in his favor against defendant for $921.75, out of the estate.

It is urged against the validity of this claim that the money of Edwards was not deposited with the firm of Hudson & Co.,

and hence that there is no privity of contract between Edwards and the firm; that he had deposited money with Safford, Hudson & Co., and that that company owed him; and while, as between the two firms, Safford, Hudson & Co. might require Hudson & Co. to reimburse them, should they be required to pay the same, by the terms of this contract, but that, Edwards being no party to that contract, he could not enforce it against the latter firm. This would be true unless he, by some act of his, waived his right to sue Safford, Hudson & Co., and made Hudson & Co. his debtor. The depositor Edwards, when he had knowledge of the change of firms, had the right to withdraw his funds from the bank, and to treat solely with the firm that received his deposit. But if he, after full knowledge of all the facts, acquiesced in the change of firms, permitted his funds to remain with the new firm, and they treated him as their depositor, and carried his balance into their books, they cannot be heard to say that they do not owe him. They are estopped by their acts. The evidence shows that the books of Hudson & Co. show that Edwards was a creditor to the amount he claims at the time of the assignment of Hudson & Co. to Stiles; and as the assignment was for the benefit of creditors, it was for the benefit of this creditor; and as it appears that dividends to 30 per cent. have been paid other creditors, this creditor was entitled to a like amount out of the estate. This was the judgment of the court below. It is also contended that as Edwards had received $1,000 from Wasson and Safford, and had released them, that thereby Hudson & Co. were released, and the familiar principle is invoked that the release of one joint debtor is a release of all. The revised statutes of Arizona, § 133, repeals this well-known doctrine of the common law, and enacts that the release of one joint debtor does not release the others. These were not, however, joint obligations of these firms. The contract of each, whatever it was, whether expressed or implied, was a several obligation. It is not necessary to decide whether Edwards is estopped to assert that Safford, Hudson & Co. are his debtors, by permitting his funds to remain with Hudson & Co. after knowledge of the transfer.

This only need be decided: that Hudson & Co. became his debtor by their acts, and, while Edwards might have repudiated it, they could not. Again, it is urged that the deposit checks or tickets in evidence (and they were evidences to the depositor of his deposit) were due when given, and the statute of limitation begins to run against them at that time; that a deposit in a bank creates a mere debt or chose in action. This is true for many purposes; but when a bank holds the funds of a depositor subject to call at any time, the contract is to pay on demand, and the statute does not begin to run until demand. We see no error in the record, and the judgment is affirmed.

Porter and Wright, JJ., concur.

MEMORANDUM DECISIONS

TERRITORY OF ARIZONA v. JAMES S. DOUGLAS. (Criminal No. 44.)

APPEAL from the District Court of the Second Judicial District in and for the County of Pinal. W. W. Porter, Judge.

G. H. Oury and E. J. Edwards, for Appellant.

Atty. Gen., for Appellee.

January 9, 1888. Dismissed.

THOMAS D. SATTERWHITE, Appellee, v. JAMES REILLY, Appellant. (Civil No. 231.)

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

No appearance for Appellant.

Geo. G. Berry, for Appellee.

January 12, 1888. Dismissed.

UNITED STATES OF AMERICA, Appellant, v. MARK EZEKIELS et al., Appellees. (Civil No. 223.)

APPEAL from the District Court of the First Judicial District in and for the County of Pima.

O. T. Rouse, U. S. Dist. Atty., for Appellant.

T. D. Satterwhite, for Appellees.

March 3, 1888. On motion of United States District Attorney, defendants and appellees consenting thereto, judgment was entered in favor of the United States.

BENONI BLACKMORE, Appellee, v. JAMES REILLY, Appellant. (Civil No. 219.)

(S. C. 17 Pac. 72.)

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

James Reilly and Thomas Mitchell, for Appellant.

Geo. G. Berry, for Appellee.

PER CURIAM. This case is the same as the Town-Site Cases in 2 Ariz. 272, 15 Pac. Rep. 26, and upon the authority of those cases the judgment will be reversed and the case remanded.

Wright, C. J., and Porter and Barnes, JJ., concur.

(Opinion filed March 16, 1888.)

GEO. B. HENEY, Appellant, v. PIMA COUNTY, Appellee. (Civil No. 243.)

(S. C. 17 Pac. 263.)

APPEAL from the District Court of the First Judicial District in and for the County of Pima.

Haynes & Mitchell and F. J. Heney, for Appellant.

H. R. Jeffords, Dist. Atty., for Appellee.

PER CURIAM. In this case we are asked to review the decision of this court in case of same title reported in 2 Ariz. 257, 14 Pac. 299. We see no good reason to change the views there expressed. The county is not bound by law to pay these fees; and, to be bound by contract, must assent to it. The board, however, have power to deal with the equities of the case, so forcibly urged upon us, and it rests with them to pay for these services as they see fit. The judgment is affirmed.

Wright, C. J., and Porter and Barnes, JJ., concur.

(Opinion filed April 5, 1888.)

HENRY T. BALDRIDGE, Appellant, v. JAMES REILLY, Appellee. (Civil No. 227.)

APPEAL from the District Court of the First Judicial District in and for the County of Cochise.

Geo. G. Berry, for Appellant.

Thomas Mitchell, for Appellee.

PER CURIAM. We think that the probate court erred in striking out that portion of defendant's answer to the

petition for distribution wherein there was a denial of a balance in the hands of the removed administrator, Reilly, and for that reason affirm the judgment of the District Court, holding for naught the judgment of the probate court, entered March 15, 1887.

(Opinion filed May 26, 1888.)

N. HERRICK et al., Appellants, v. WM. A. HANCOCK AND WIFE, Appellees. (Civil No. 254.)

APPEAL from the District Court of the Second Judicial District in and for the County of Maricopa.

Alexander and Lighthizer, for Appellants.

No appearance for Appellees.

July 2, 1888. Dismissed on motion of appellants.

INDEX

INDEX.

ABANDONMENT. See Mines and Mining, 5; Railroads, 1.

ABSTRACT. See Appeal and Error, 1.

ACCESSORY. See Forgery, 1.

ACCORD AND SATISFACTION.

ACCORD AND SATISFACTION.—Where defendants deposited a sum in the bank to be placed to plaintiff's credit when he had given a receipt in full, and the bank passes it to the plaintiff's credit and explains the circumstances and demands from him a receipt in full which he refuses to give, the mere fact of plaintiff withdrawing the money under the circumstances does not constitute a release. (Simms v. Hampson, 233.)

ADMISSIONS. See Criminal Law, 13, 17.

ADVERSE POSSESSION. See Suit to Quiet Title, 2.

ADVERSE USER. See Irrigation, 6.

AFFIDAVITS. See Appeal and Error, 5.

AMOUNT IN CONTROVERSY. See Appeal and Error, 2.

APPEAL AND ERROR.

1. APPEAL AND ERROR—ABSTRACT—PRESUMPTION—WHERE EVIDENCE OBJECTED TO IS NOT SET FORTH IN ABSTRACT OBJECTIONS THERETO WILL NOT BE CONSIDERED.—Where the abstract does not set forth the documents to the admission of which objection was made below this court must presume that they were correctly received, and cannot consider alleged error in the ruling of the trial court. (U. S. v. Ellis, 253.)

2. APPEAL AND ERROR—APPEAL FROM SUPREME COURT OF TERRITORY TO UNITED STATES SUPREME COURT—JUDGMENT FIXES AMOUNT IN CONTROVERSY—ACT OF CONGRESS OF MARCH 3, 1885, CITED.—The Act of Congress of March 3, 1885, provides that "no appeal or writ of error shall hereafter be allowed from any judgment * * * in the supreme court of any of the territories of the United States,

APPEAL AND ERROR (Continued).

unless the matter in dispute, exclusive of costs shall exceed the sum of five thousand dollars.'' Where the judgment is for less than that sum and in favor of the plaintiff and acquiesced in by him and the appeal was taken by the defendant against whom the judgment was rendered, and by the defendant the appeal is now prayed, the amount in controversy must be the amount of the judgment, and an appeal to the United States Supreme Court cannot be had. (Johnson v. Tully, 223.)

3. APPEAL AND ERROR—CONFLICT OF EVIDENCE—VERDICT OF JURY WILL NOT BE DISTURBED.—Where the testimony is contradictory this court will not disturb the verdict of a jury. (O'Toole v. Melander, 392.)

4. APPEAL AND ERROR—FAILURE OF EVIDENCE TO SUPPORT JUDGMENT.—Where the evidence fails to support the judgment the cause will be reversed. (Miller v. Hopkins, 213.)

5. APPEAL AND ERROR—FINDING BASED UPON PROOF TECHNICALLY DEFECTIVE WILL NOT BE DISTURBED WHERE SUBSTANTIAL JUSTICE HAS BEEN DONE—AFFIDAVITS TAKEN BEFORE JUSTICE OF THE PEACE WITHOUT THE TERRITORY—COMP. LAWS ARIZ. 1877, p. 473, par. 2863—IDEM, p. 475, par. 2871, CITED.—Where affidavits were taken before a justice of the peace, without the territory, for the purpose of proving the petitioner to be the father of the intestate, and upon said proof the probate court found such to be the fact, this court is not disposed to disturb the finding, though there be technical defect in the proof, as substantial justice has been accomplished. Statutes cited, *supra*. (Reilly v. Clark, 299.)

6. APPEAL AND ERROR—HARMLESS ERROR IN ADMISSION OF EVIDENCE.—Where the trial court erred in admission of evidence as to reputation which could only affect the question whether the engine was handled negligently, which question was clearly and overwhelmingly established by competent evidence, such error is harmless as it could not affect the verdict in the case. (Hobson v. R. R. Co., 171.)

7. APPEAL AND ERROR—HARMLESS TECHNICAL ERROR WILL NOT BE PERMITTED TO WORK REVERSAL.—It is a general rule that wherever and whenever substantial justice is secured, a mere technical error, which is harmless in character, and which has worked no injury, will not be permitted to defeat or annul the final conclusion or consummation of judicial proceedings. (Hobson v. R. R. Co., 171.)

8. APPEAL AND ERROR—INSTRUCTIONS—CHARGE TO JURY TO BE CONSIDERED AS A WHOLE.—In the review of a charge to the jury the whole and entire charge should be considered together. (United States v. Tenney, 29.)

APPEAL AND ERROR (Continued).

9. APPEAL AND ERROR—JUDGMENT UPON VERDICT WHERE THERE IS SUBSTANTIAL CONFLICT IN EVIDENCE WILL NOT BE DISTURBED.—A judgment based upon a verdict where there is a substantial conflict in the evidence should not be disturbed by the appellate court. (Copper Queen Min. Co. v. Ariz. Prince Copper Co., 10).

10. APPEAL AND ERROR—NECESSITY FOR MOTION FOR NEW TRIAL—FINDINGS WILL NOT BE REVIEWED WITHOUT—FINDINGS ON SAME FOOTING AS VERDICT OF JURY—PRACTICE TO OBTAIN REVIEW OF QUESTION OF WANT OR INSUFFICIENCY OF EVIDENCE TO SUPPORT JUDGMENT.—The findings of the court below will not be reviewed on appeal unless there is a motion for a new trial. *Federico* v. *Hancock*, 1 Ariz. 512, 25 Pac. 650, cited and approved. Findings by the court stand on the same footing as the verdict of the jury. When a party complains that the evidence was insufficient to justify a verdict or decision the appropriate remedy is by motion for a new trial. If the verdict or written findings support the judgment so long as they remain undisturbed the judgment cannot be assailed on the ground that it is not justified by the evidence. Before the judgment can be attacked on this ground the verdict or finding must be set aside because not justified by the evidence and this can only be done on motion for a new trial. In the absence of motion for a new trial findings are conclusive and binding on this court. (Paul v. Cullum, 16.)

11. SAME—FINDINGS—WHERE ATTACKED FOR WANT OF EVIDENCE RECORD MUST PURPORT TO CONTAIN ALL THE EVIDENCE.—When the statement on appeal does not purport to contain all the evidence an appellate court will not consider an objection that the findings are not supported by the evidence. (Paul v. Cullum, 16.)

12. SAME—JUDGMENT—CLERICAL ERROR NOT PREJUDICIAL TO APPELLANT.—Where the judgment shows a clerical mistake not prejudicial to appellant judgment will be affirmed. (Paul v. Cullum, 16.)

13. APPEAL AND ERROR—OBJECTIONS TO PLEADINGS CANNOT FIRST BE RAISED IN APPELLATE COURT.—Criticisms will not be made, or objections raised, to a pleading for the first time in an appellate court. (Dalton v. Rentaria, 275.)

14. APPEAL AND ERROR—PLEADING—WHERE AFTER GENERAL DEMURRER AMENDED PLEADING IS FILED TO WHICH NO DEMURRER IS INTERPOSED, NO INSUFFICIENCY WHICH MIGHT HAVE BEEN CURED BY AMENDMENT CAN BE URGED AS GROUND FOR REVERSAL.—Where defendant demurred generally to the complaint and thereafter an amended complaint was filed to which no demurrer was interposed, any insufficiency which might have been cured by amendment may

APPEAL AND ERROR (Continued).

not now be urged as ground for reversal. (Hobson v. R. R. Co., 173.)

15. APPEAL AND ERROR—PRACTICE—RECORD ON APPEAL—MEMORANDUM OF CLERK AS TO STATEMENT HAVING BEEN AGREED UPON NOT COMPLIANCE WITH STATUTE.—APPEAL MAY BE DISMISSED FOR SUCH DEFECT.—Where the statute provides that the "transcript on appeal" shall, when settled by the judge, be signed by him, "with the certificate that the same has been allowed and is correct;" and when, in lieu of this, it is agreed upon by the parties that they or their attorneys shall sign the same, "with a certificate that the same has been agreed upon by them and is correct," and the record does not show that either one or the other was done, but contains a memorandum, by the clerk, in no manner verified, that the statement was agreed upon, such memorandum is not a compliance with the statute and the court would be justified in declining to hear the case for this defect, without further examination. (Negro v. Hatch, 144.)

16. APPEAL AND ERROR—RECORD—FAILURE TO ASSIGN ERROR—COMP. LAWS, ARIZ., 1877 p. 461, par. 2776-80 CONSTRUED—DISMISSAL.—Where the statement of the case is not certified in compliance with the statute, *supra*, only error in the judgment roll can be considered, upon which, there being no errors assigned, the appeal will be dismissed. (McAllister & McCone v. Benson M. & S. Co., 350.)

17. APPEAL AND ERROR—REFUSAL OF INSTRUCTIONS TO JURY—IN ABSENCE OF ASSIGNMENT OF ERROR THEREFOR THIS COURT WILL NOT REVIEW ANY ERROR THEREIN.—Where there is no assignment of errors in the refusal of instructions asked for by defendant this court will not review any error therein. (Gray v. Salt River Valley Canal Co., 225.)

18. APPEAL AND ERROR—REHEARING—PRACTICE—WHEN REFUSED—PURPOSE OF—ARGUMENT ON CONFINED TO POINTS RAISED IN PETITION FOR.—Where neither the petition for rehearing nor the argument thereon points out any misapprehension of the record or mistake of law, this court will decline to review its former decision. It is not the office or purpose of a rehearing to reopen the whole cause, and to require of the court a reconsideration thereof. Argument of points not included in the petition for rehearing is bad practice. A petition for a rehearing should state particularly the ground upon which it is asked, and if granted, the argument should be confined to those grounds. (Copper Queen Mining Co. v. Arizona Prince Copper Co., 169.)

19. APPEAL AND ERROR—REVIEW OF EVIDENCE TO SUPPORT FINDING—

APPEAL AND ERROR (Continued).

NEW TRIAL—OBJECT OF MOTION FOR.—Where the evidence is sufficient to support the finding, or where the evidence is conflicting, although it may greatly preponderate against the finding, the appellate court will not, at law, interfere; where, however, in equity, the evidence is clearly insufficient, or where there is no evidence at all, it is otherwise. The object of a motion for a new trial is to enable the appellate court to look into the evidence to see if it be sufficient to support the finding. (Dalton v. Rentaria, 275.)

20. APPEAL AND ERROR—RIGHT OF APPEAL—ORDER AFFECTING A SUBSTANTIAL RIGHT—LAWS OF 1879, ACT NO. 48, p. 72, sec. 7, CITED—ORDER REFUSING TO DISSOLVE TEMPORARY INJUNCTION NOT SUCH AN ORDER.—In a suit for an accounting between partners, where attaching creditors have intervened and upon issue joined as to whether chattels attached are partnership property the court has found against intervenors, such judgment, though not final, does affect a substantial right, and is appealable. An order refusing to dissolve a temporary injunction is a mere interlocutory order, in aid of the procedure of the cause and affects no substantial right and is not appealable. (Putnam v. Putnam, 259.)

21. SAME—NECESSITY FOR MOTION FOR NEW TRIAL—FINDINGS CONCLUSIVE IN ABSENCE OF—PURPOSE OF—COMP. LAWS ARIZ. 1877, p. 438, par. 2630-2631, CITED.—In the absence of a motion for new trial the findings of the trial court must be conclusive. It is the purpose of a motion for new trial to enable the court to look into the sufficiency of the evidence to sustain the findings. Statute, *supra*, cited. (Putnam v. Putnam, 259.)

22. APPEAL AND ERROR—SUBSTANTIAL CONFLICT IN EVIDENCE.—Where there is a substantial conflict in the evidence the judgment of the trial court will not be reversed on the ground that the evidence does not warrant it. (Barter v. County of Pima, 88.)

23. APPEAL AND ERROR—TRANSCRIPT—LEAVE TO FILE—SHOWING SUFFICIENT—REV. ST. ARIZ. 1887, par. 938, CITED.—Under par. 938, *supra*, where a party is unable to file his transcript in the time limited therein, from any unavoidable cause, the court shall, upon satisfactory proof thereof, permit such transcript to be filed at a later period: Held, appellant's showing on a cross-motion for leave to file the transcript sufficient. (Bryan v. Pinney, 390.)

24. APPEAL AND ERROR—VERDICT INCORPORATED INTO JUDGMENT VERBATIM IS BEFORE COURT WITHOUT BILL OF EXCEPTIONS.—A verdict, copied verbatim into a judgment, is before the court on appeal the same as if brought up by a bill of exceptions. (Bashford v. Kendall, 6.)

See Criminal Law, 1, 2, 4, 24; Venue, 1.

ARBITRATION.

1. ARBITRATION—WHERE CONTRACT CALLS FOR ARBITRATION—PARTIES MUST SEEK THEIR REMEDY UNDER ITS TERMS—DECISION OF ARBITER CONCLUSIVE IN ABSENCE OF FRAUD OR MISTAKE.—Where the parties, by the terms of the contract, agree upon an arbitrator or other person to construe the contract and fix and determine obligations under it, parties must seek their remedy according to the terms of the contract, and those terms will be enforced in all cases in the absence of fraud, bad faith or mistake clearly made to appear. (U. S. v. Ellis, 253.)

APPROPRIATION. See Irrigation, 9, 12, 14; Water and Water Courses, 1.

APPURTENANCES. See Mortgages, 1.

ARMY AND NAVY.

1. ARMY AND NAVY—COURTS MARTIAL—JURISDICTION OVER CIVIL RIGHTS—EVIDENCE—OFFICIAL MAP.—An official map, purporting to determine water privileges, made by order of a military governor, is not admissible in evidence. A military officer has no authority to exercise judicial functions, outside of military affairs, nor to authorize others, not otherwise capacitated, to determine the civil rights of a citizen. Martial law may enforce order, but has no jurisdiction over property rights. (Dalton v. Rentaria, 275.)

ASSESSMENT WORK. See Mines and Mining, 1.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—EVIDENCE OF TITLE AS ASSIGNEE ADMISSIBLE THOUGH SUING IN PERSONAL CAPACITY—PARTIES—ASSIGNEE MAY SUE EITHER IN PERSONAL OR REPRESENTATIVE CAPACITY TO RECOVER PROPERTY REDUCED TO POSSESSION FROM THIRD PARTY WRONGFULLY DEPRIVING HIM OF SAME.—Certain evidence of title in plaintiff as assignee held admissible in action of replevin though plaintiff sued simply in his individual capacity. Where an assignee has taken possession of the personal property conveyed to him by a deed of assignment, and has been wrongfully deprived thereof by a third party, he may sue for its recovery either in his personal or representative capacity. (Paul v. Cullum, 16.)

2. SAME—PRESUMPTIONS—WITHOUT PROOF OF CREDITORS DISSENT THEIR ASSENT PRESUMED.—In the case of a general voluntary

ASSIGNMENT FOR BENEFIT OF CREDITORS (Continued).

assignment for the benefit of creditors without preference, and without restrictions, in the absence of proof of dissent, the law presumes the assent of the creditors to the assignment. (Paul v. Cullum, 16.)

See Fraudulent Conveyance, 4.

ASSIGNMENT OF UNEARNED SALARY. See Public Officers, 1.

ATTACHMENT.

1. ATTACHMENT—COMP. LAWS 1877, p. 426, par. 2557, CITED—EVIDENCE—ACCOUNT STATED ADMISSION OF INDEBTEDNESS RENDERING UNNECESSARY OTHER PROOF—STATING OF ACCOUNT WITHIN THIS TERRITORY FOR GOODS SOLD WITHOUT IS NOT A NEW CONTRACT TO SUSTAIN ATTACHMENT UNDER STATUTE SUPRA—ATTACHMENT SUMMARY REMEDY AND PLAINTIFF MUST COME CLEARLY WITHIN ITS PROVISIONS.—Where goods were sold by plaintiff without the territory and thereafter the open account therefor was stated within the territory by the written admission of defendant of the correctness of the account such account stated amounts to a solemn admission of the fact of indebtedness, which, if proved, makes unnecessary other evidence of the indebtedness, rather than a new contract. It is not a contract made in this territory, for goods sold out of the territory, to sustain an attachment under the statute *supra*, authorizing the issuance of a writ where plaintiff sues to recover "an indebtedness upon a contract, expressed or implied, for the direct payment of money, and that such contract was made or is payable in this territory." Attachment is a summary remedy, and a plaintiff must clearly come within its provisions to invoke its powers. (Ordenstein v. Bones, 229.)

See Sheriffs, 2.

BAILMENT.

1. BAILMENT—GRATUITIOUS—DUTY OF BAILEE—AGREEMENT TO USE MONEY DEPOSITED—RELATION CHANGED TO DEBTOR UPON USE OF MONEY.—Where a bailee as matter of accommodation allows money to be deposited in his safe he is not responsible for the loss of the money through the robbery of the safe, being only bound to exercise the same care of the deposit as he is in the habit of bestowing on his own money; and if there be an agreement for the use of the money deposited the relation of debtor and creditor commences with the use, and if the robbery took place before that time the loss must fall upon the depositor. (Carlyon v. Fitzhenry, 266.)

BANKS AND BANKING.

1. BANKS AND BANKING—SUCCESSORS IN BUSINESS—ESTOPPEL—DEPOSITORS.—Where one banking firm has succeeded another, paying and collecting the accounts of its predecessor, assuming its obligations, taking and continuing to use its books until the necessities of the business required a new set, it is estopped to deny its indebtedness to a depositor with the old firm who acquiesced in the change of firms, permitted his funds to remain with the new firm, and was treated by the successor as its depositor. (Starr v. Stiles, 436.)

See Accord and Satisfaction, 1; Limitation of Actions, 2.

BENEFICIAL USE. See Irrigation, 9.

BILL OF RIGHTS. See Territories, 1.

BOND IN ACTIONS FOR TORT.

1. BOND IN ACTIONS FOR TORT—FILING BY LEAVE OF COURT—ACT OF MARCH 8, 1883.—Where a statute, *supra*, was passed within four days prior to the commencement of suit, requiring filing of bond for costs at beginning of actions for torts, it was not error for court to grant leave to file bond thereafter. (Hobson v. R. R. Co., 171.)

BURDEN OF PROOF. See Fraudulent Conveyance, 4; Negligence, 3.

BILL OF EXCEPTIONS. See Criminal Law, 10, 11.

BOARD OF EQUALIZATION. See Taxation, 5.

CHANGE OF VENUE.

1. CHANGE OF VENUE—PROPERLY REFUSED—COMP. LAWS ARIZ. 1877, p. 131, par. 699 AND p. 132, par. 701 CITED.—Where an application for change of venue, made on the ground that a fair and impartial trial could not be had in the county, supported by four affidavits, was resisted by a showing of fourteen affidavits denying the existence of prejudice against the defendant, the application was properly refused. Statutes cited, *supra*. (Territory v. Barth, 319.)

CHARGE TO JURY. See Appeal and Error, 8.

CHASTITY. See Criminal Law, 25.

CHATTEL MORTGAGE.

1. CHATTEL MORTGAGE—TITLE REMAINS IN MORTGAGOR UNTIL FORECLOSURE.—A chattel mortgage in this security is a security merely and until foreclosure, or some act tantamount thereto, the title to the property mortgaged remains in the mortgagor. (Mooney v. Broadway, 107.)

CO-MAKER. See Negotiable Instruments, 3.

COMMUNITY SYSTEM. See Husband and Wife, 1.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—INJUSTICE IN OPERATION OF LAW—COURTS CANNOT ANNUL LAWS ON ACCOUNT OF.—That a law is unjust is not a question of law. Courts cannot annul tax laws because of their operating unequally and unjustly. (Territory v. Connell, 339.)

2. SAME — LEGISLATURES — POLICE REGULATIONS. — Laws regulating liquor dealers, saloon keepers, hawkers, etc., and imposing a license thereon are within the police powers of the legislature. (Territory v. Connell, 339.)

3. CONSTITUTIONAL LAW—LEGISLATIVE POWER OF TERRITORY LIMITED BY ORGANIC LAW—§ 1851, REV. ST. U. S. 1878, (ORGANIC LAW OF ARIZ. REV. ST. ARIZ. 1901, par. 15)—TERRITORIAL LAWS MUST BE CONSISTENT WITH CONSTITUTION—§ 1891 REV. ST. U. S. 1878 (ORGANIC LAW OF ARIZ. REV. ST. ARIZ. 1901, par. 67) TERRITORIES UNDER CONTROL OF CONGRESS—§ 3, ART. 4 CONST. U. S.—The limitation upon the legislative power of the territories is the organic law which governs them. A law of the territory which is not consistent with the constitution of the United States is beyond its powers, and invalid. The territories are under the complete control of Congress. (Territory v. Blomberg, 204.)

4. SAME—CRIMINAL LAW—PROCEDURE—ACT OF MARCH 12, 1885, PROVIDING FOR PROSECUTION BY INFORMATION INVALID INSOFAR AS IN CONFLICT WITH THE FIFTH AMENDMENT OF CONSTITUTION—ACT NO. 83, LAWS OF 1885—PROSECUTION BY INDICTMENT FOR CAPITAL AND INFAMOUS CRIMES GUARANTEED BY CONSTITUTION—"INFAMOUS CRIME" DEFINED.—Act of March 12, 1885, providing for prosecution of crimes, misdemeanors and offenses by information, invalid in so far as in conflict with the fifth amendment to the constitution of the United States, which provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." Prosecution for infamous offenses by indictment by a grand jury is as firmly guar-

CONSTITUTIONAL LAW (Continued).

anteed by the constitution as the right of trial by jury. A crime punishable by imprisonment for a term of years at hard labor is an "infamous crime." (Territory v. Blomberg, 204.)

CONTINUANCE.

1. CONTINUANCE—ABSENCE OF WITNESSES—MOTION FOR CONTINUANCE PROPERLY OVERRULED WHERE PARTY ADMITS UNDER STATUTE THAT WITNESS IF PRESENT WOULD TESTIFY AS STATED IN AFFIDAVITS FOR CONTINUANCE—COMP. LAWS, 1877, c. 48, p. 433, § 160, CITED.—The motion for continuance on account of absence of witnesses was properly overruled, inasmuch as plaintiff admitted that the witnesses, if present, would testify to the facts stated in the affidavit. Statute cited, *supra*. (Hobson v. R. R. Co., 171.)

2. CONTINUANCE—GRANTING MATTER OF DISCRETION—NEW TRIAL—SURPRISE UNDER COMP. LAWS 1877, p. 438, par. 2631, subd. 3—SHOWING OF DILIGENCE INSUFFICIENT TO JUSTIFY INTERFERENCE WITH DISCRETIONARY RULING OF TRIAL COURT.—Where a motion for new trial is made on the ground of surprise, under the statute, *supra*, and for failure to grant a continuance and it appears that the cause has been pending for a great length of time, and that no written application for continuance was made, and that there was no showing as to diligence and cause of absence of one defendant, as well as an unsatisfactory showing as to the sickness of the other the court will decline to interfere with the exercise of discretion by the district court in refusing to continue the cause or grant a new trial therein. (Solomon v. Norton, 100.)

See Criminal Law, 4; Trial, 1.

CONTRACTS.

1. CONTRACTS—SUBLETTING OF RAILROAD CONTRACT—INCORPORATION OF ORIGINAL CONTRACT INTO SECOND CONTRACT EXCEPT AS TO CONFLICTS—INTERPRETATION.—Defendants had contracted with one Underwood for the construction of a railroad, and had sublet certain construction work to plaintiff agreeing to pay him for the work done in any one calendar month on or before the fifteenth or twentieth of the following month. Plaintiff agreed to be bound by the provisions of the contract of defendants with Underwood, and that all estimates done or claimed by him should be made by engineers in accordance with the original contract, which was incorporated, except as to conflicts. Under the contract the plaintiff is not obligated to secure certificate from Underwood's engineers, he not being in privity of contract with Underwood. It was for the defendants to obtain such estimates and on the twentieth of each month there

CONTRACTS (Continued).

was due plaintiff the amount for the work done during the preceding month and he then had a right of action therefor. (Simms v. Hampson, 233.)

See Irrigation, 7.

CONTRIBUTORY NEGLIGENCE. See Negligence, 3.

COUNTIES.

1. COUNTIES—Act of February 12, 1881—Section 3 of Chapter 2, Comp. Laws of 1877.—By the act of February 12, 1881, the legislature intended simply to prescribe the manner of presenting claims against counties, and to define the duties of the board of supervisors in passing on same, and it in no way modifies or affects section 3 of chapter 2 of the Compiled Laws, authorizing counties to sue and be sued. (Smith v. County of Mohave, 27.)

2. COUNTIES—CHARGE AGAINST—NOTARY'S FEE FOR ACKNOWLEDGMENT TO TAX DEEDS NOT A PROPER CHARGE.—Under statute making it the duty of the tax collector to execute and acknowledge deeds to property unredeemed, and to deliver same to chairman of the board of supervisors without charge, a notary cannot recover from the county for services performed in taking such acknowledgments at the request of the tax collector. (Heney v. Pima County, 257.)

3. COUNTIES—LOCATION OF COUNTY SEAT—LAWS 1885, ACT No. 22, p. 20 PROVIDING FOR LOCATION BY VOTERS OF COUNTY VALID.—Statute, *supra*, enacts that the county-seat shall be where the voters designate. Such laws have been acquiesced in by the courts and the law makers too long now to question their validity. (Territory v. Mohave County, 248.)

4. COUNTIES—PLEADING—ALLEGATIONS IN ACTION OF ASSUMPSIT—JURISDICTION OF DISTRICT COURT—ACTION ON ACCOUNT LIES AGAINST COUNTIES.—Where complaint after setting forth the contract as executed, alleges full performance by plaintiffs, and presentation to and rejection of their demand by the board of supervisors of a county such complaint is not subject to demurrer for want of jurisdiction of district court, under act of February 12, 1881. The right to sue a county remains unimpaired and extends to every case of account after presentation to and rejection by the board of supervisors. (Smith v. County of Mohave, 27.)

COUNTY SEAT. See Counties, 3.

COUNTY TREASURER. See Officers, 1.

COURTS.

1. COURT—SUPREME COURT—ADJOURNED TERMS—REV. ST. U. S. 1878, SEC. 1934, CONSTRUED.—An adjourned term of the Supreme Court, held pursuant to an order signed by a majority of the judges, under Rev. St. U. S., Sec. 1934, is a distinct and separate term and not merely an adjourned *session* of the same term. (Bryan v. Pinney, 390.)

2. COURTS—HAVE POWER TO RENDER DECISIONS AND ENTER JUDGMENTS IN VACATION—STATUTES CITED—§ 146 § 637, CHAPT. 48 COMPILED LAWS 1877—RULE 37 SUPREME COURT, PROMULGATED IN 1879, APPROVED.—The court has power to render a decision, and cause a judgment to be entered, and file its reasons therefor, in vacation, in a cause which has been regularly heard and submitted to the court in the term, and taken under advisement. Statutes *supra* cited. Rule 37 of Supreme Court consistent with the laws of territory and acts of Congress. (Woffenden v. Charouleau, 89.)

See Counties, 4.

COURTS MARTIAL. See Army and Navy, 1.

CRIMINAL LAW.

1. CRIMINAL LAW—APPEAL AND ERROR—TRANSCRIPT OF REPORTER'S NOTES—RECORD DEFECTIVELY CERTIFIED—EFFECT AS BILL OF EXCEPTIONS.—Neither the reporter's transcript of the testimony nor papers bearing the certificate of the clerk, where such certificate does not show that the record of the action is sent up, but only such portions thereof as are mentioned in such certificate, can have the effect of a bill of exceptions. (Territory v. Neligh, 69.)

2. SAME—APPEAL AND ERROR—INSTRUCTIONS—REFUSAL OF REQUESTS TO INSTRUCT WILL NOT BE REVIEWED WHEN TESTIMONY AND INSTRUCTIONS GIVEN ARE NOT IN RECORD.—Where the testimony and instructions actually given are not in the record on appeal refusal of requests to instruct will not be reviewed. Territory v. Neligh, 69.

3. SAME—EVIDENCE—UNCORROBORATED TESTIMONY OF ACCOMPLICE INSUFFICIENT TO CONVICT.—The jury should not find the defendants guilty from the uncorroborated testimony of an accomplice. (Territory v. Neligh, 69.)

4. CRIMINAL LAW—CONTINUANCE—PRACTICE ON APPLICATION FOR GRANTING MATTER OF DISCRETION WITH TRIAL COURT—NEW TRIAL—IMPROPER REFUSAL GROUND FOR—APPEAL AND ERROR—APPELLATE COURT WILL REVIEW ACTION OF TRIAL COURT IN REFUSING CONTINUANCE WHERE THERE IS ABUSE OF DISCRETION—STATUTE

CRIMINAL LAW (Continued).

MAKES IMPROPER REFUSAL OF CONTINUANCE GROUND OF ERROR—COMP. LAWS 1877, p. 462, par. 2785, subd. 2.—Practice on application for continuance reviewed and facts held sufficient to have entitled defendant to continuance. A motion for a new trial based upon an improper refusal of such application for continuance should have been granted. It is settled doctrine that the right and power to grant continuances is lodged with the trial judge, but this principle is subordinate to and controlled by that other principle that, where the trial judge has been guilty of an abuse of discretion in declining or refusing to postpone a cause, an appellate court, if satisfied of that fact, may review his action, and grant a new trial. Besides the statute of this territory makes this refusal a ground of error. Statute *supra*. (Territory v. Davis, 59.)

5. SAME—EVIDENCE—*Res Gestae*—STATEMENTS OF DECEASED AT THE TIME OF SHOOTING.—When the testimony shows that within two or three minutes of the time of the shooting the deceased made certain statements as to what happened such statements are a part of the *res gestae* and admissible. (Territory v. Davis, 59.)

6. SAME—CRIMINAL RESPONSIBILITY—INSANITY—DELIRIUM TREMENS AS DEFENSE—ALCOHOLISM MAY CAUSE INSANITY—RULE DIFFERENT FROM ORDINARY DRUNKENNESS.—A continuous and excessive use of ardent liquors may result in such a state of insanity as to relieve from criminal responsibility for acts done while in a condition of mind produced and caused by such excessive drinking. It is very different from acts produced in a state of ordinary intoxication, and must be governed by wholly different rules and principles. (Territory v. Davis, 59.)

7. SAME—EVIDENCE OF INSANITY FROM EXCESSIVE DRINKING ADMISSIBLE—ACTUAL DRUNKENNESS NOT NECESSARY—COMMENTS OF JUDGE ON EVIDENCE—INVASION OF PROVINCE OF JURY.—Evidence tending to show that from a continuous use of ardent spirits the mind of defendant had become weakened, and that he was suffering, at the time, from an attack of delirium tremens or alcoholism, admissible, though there was no pretense that he was actually drunk at the time of the shooting. Where such evidence was admitted by the trial court, comments by the court throughout the trial to the effect that such testimony was of no importance, without a showing that defendant was in an actual state of intoxication, was prejudicial error. This testimony was for the consideration of the jury, and to enable them to determine the condition of the mind of the defendant, at the time he fired the shot, necessary to a finding of the degee of the guilt of the defendant. (Territory v. Davis, 59.)

CRIMINAL LAW (Continued).

8. SAME—INSANITY—EXPERT TESTIMONY—QUALIFIED PHYSICIAN, NOT EXPERT ON INSANITY, COMPETENT TO TESTIFY AS TO EFFECT OF DRINK UPON PERSON SUFFERING FROM SPECIAL INJURIES.—Where testimony of physician, in active practice, was offered to show an injury to brain of defendant, and probable effects of alcoholism in view of such injury, such offer should not be rejected because physician was not shown to be an expert on insanity. (Territory v. Davis, 59.)

9. SAME—EVIDENCE—CROSS-EXAMINATION OF DEFENDANT—NOT LIMITED TO EXAMINATION IN CHIEF—WHERE DEFENDANT VOLUNTARILY TAKES WITNESS STAND IN HIS OWN BEHALF RULES OF CROSS-EXAMINATION APPLICABLE TO ORDINARY WITNESSES GOVERN HIS EXAMINATION—STATUTE CITED COMP. LAWS 1877, p. 101, par. 408.—Cross-examination as to what defendant thought and intended to do at the time he fired the shot proper cross-examination where defendant went on the stand as a general witness in his own behalf, Under our statute, *supra*, there is no limitation that requires the cross-examination to be limited to matters about which the defendant was examined in chief. Where he voluntarily assumes the character of a witness he cannot interpose his privilege not to be compelled to testify against himself but must reply to legitimate cross-examination and *this* must be determined by the same rules applicable to the cross-examination of other witnesses. (Territory v. Davis, 59.)

10. CRIMINAL LAW—CRIMINAL PRACTICE—RECORD ON APPEAL—REPORTER'S TRANSCRIPT—NECESSITY FOR—BILL OF EXCEPTIONS—REVIEW OF ERRORS IN RECORD.—The law of the Territory requiring the reporter of all criminal cases to file certified copy of the testimony, rulings of the court, with exceptions taken thereto does not do away with the necessity of a bill of exceptions, and in the absence of such bill of exceptions the only errors of which this court can take notice arise from the record. (Territory v. Munroe, 1.)

11. SAME--SAME--WAIVER OF WRITTEN INSTRUCTIONS IN CRIMINAL CASES—ORAL INSTRUCTIONS TO JURY IN CAPITAL CASES CONDEMNED—ABSENCE OF BILL OF EXCEPTIONS—PRESUMPTION OF CORRECTNESS OF ACTION OF TRIAL COURT—REVIEW OF MANIFEST ERROR IN RECORD WITHOUT BILL OF EXCEPTIONS.—In some of the states where the statute requires the instructions to be in writing, as in this territory it has been held that the same cannot be waived in a criminal and especially in capital cases. It is a dangerous practice for the trial court to give verbal instructions in a capital case. The defendant must show in what the error in refusing an instruction consists before he can ask for a reversal of a judgment, and

CRIMINAL LAW (Continued).

when no bill of exceptions is filed, the presumption must be in favor of the correctness of the action of the court, unless sufficient is shown by the record to satisfy the appellate court that the action of the lower court is manifestly erroneous under any and every conceivable state of facts. In such case it will be reviewed, notwithstanding there is no bill of exceptions. (Territory v. Munroe, 1.)

12. SAME—FAILURE TO INSTRUCT AS TO NECESSITY OF PROOFS OF CORPUS DELICTI ERROR.—It is the duty of the court to charge the jury that a conviction for murder cannot be sustained when the *corpus delicti* is not proven and the refusal of request for such charge is manifest error. (Territory v. Munroe, 1.)

13. CRIMINAL LAW—EVIDENCE—ADMISSIONS OF DEFENDANT THAT WOMAN HE LIVES WITH IS HIS WIFE PRIMA FACIE EVIDENCE OF MARRIAGE CONTRACT.—Where a man deliberately admits that the woman he lives with is his wife such admission is prima facie evidence that there has been a marriage contract between the parties. (United States v. Tenney, 29.)

14. CRIMINAL LAW—INDICTMENT UNDER EDMUNDS ACT—POLYGAMY—ALLEGATION OF COHABITATION IN SAME COUNT FOLLOWING CHARGE OF OFFENSE OF POLYGAMY HARMLESS SURPLUSAGE.—Objectional words, referring only to cohabitation after a proper allegation of a polygamous marriage, in a count of an indictment under the Edmunds Act, are harmless surplusage, and do not vitiate the indictment. (United States v. Tenney, 29.)

15. CRIMINAL LAW—INSTRUCTIONS TO JURORS—DEGREE OF CERTAINTY IN PROOF.—Proof of guilt to a moral certainty is not required in a criminal case. (Territory v. Barth, 319.)

16. CRIMINAL LAW—EDMUNDS ACT—POLYGAMY—INDICTMENT—TO ALLEGE COHABITATION AFTER MARRIAGE IN COUNT FOR POLYGAMY NOT FATAL BEING MERE SURPLUSAGE—22 U. S. Stat. L. 30; Supp. Rev. St. U. S. 1891, Chap. 47, p. 331.—Where in a count in an indictment under the Edmunds Act after properly alleging a polygamous marriage the pleader proceeds further and states that cohabitation followed such marriage, such latter statement is mere surplusage and does not render the count bad. (United States v. Tenney, 127.)

17. SAME—EVIDENCE—ADMISSIONS OF DEFENDANT COMPETENT IN PROOF OF MARRIAGE—OPEN COHABITATION COMPETENT—RULE OF PROOF OF SECOND MARRIAGE SAME AS OF FIRST—NO CEREMONY OF MARRIAGE REQUIRED IN THIS TERRITORY—HIGHEST EVIDENCE OF MARRIAGE NOT REQUIRED—ADMISSIONS AND COHABITATION SUF-

CRIMINAL LAW (Continued).

FICIENT TO ESTABLISH MARRIAGE.—Admissions of defendant, often and apparently deliberately made, that he was married to the person named in the indictment and that he openly lived with the two women named as his wives and claimed them as such was competent and admissible evidence of marriage to person so named. Proof of second or subsequent marriage does not differ from proof of first one. The same kind of evidence is admissible in each case. In this territory no ceremony of marriage is required. In this class of cases the highest evidence of marriage is not required. Such proof as was made in this case is competent and sufficient to establish marriage. (United States v. Tenney, 127.)

18. SAME—SAME—WHERE EVIDENCE IS INTRODUCED BY ONE PARTY HE HAS NO RIGHT TO COMPLAIN IF THE OTHER BE PERMITTED TO FOLLOW—PROOF OF COHABITATION IN ANOTHER TERRITORY COMPETENT TO PROVE CHARGE OF COHABITATION WITH MORE THAN ONE WOMAN UNDER THIRD COUNT—EVIDENCE COMPETENT AND ADMISSIBLE UNDER ANY COUNT OF INDICTMENT AT THE TIME GIVEN CANNOT PROPERLY BE EXCLUDED.—Where defendant testified that he lived with the two women in Utah as his wives he cannot complain if the prosecution be permitted to put questions and ascertain the facts concerning such statements. Proof of such cohabitation was admissible and competent under the third count of the indictment relating to cohabitation with more than one woman. Evidence material and competent under either count of an indictment at the time given cannot properly be excluded. (United States v. Tenney, 127.)

19. SAME—INSTRUCTIONS TO JURY—MUST BE TAKEN AS WHOLE—WHERE INSTRUCTION IS CORRECT IN PRINCIPLE IT MATTERS NOT WHERE THE WORDS ARE OBTAINED—WHERE IT APPEARS THAT THE INSTRUCTION OBJECTED TO AS ERRONEOUS IS AMBIGUOUS BUT THAT SUCH AMBIGUITY HAS BEEN CURED BY OTHER DEFINITE INSTRUCTIONS THERE WILL BE NO REVERSAL—INSTRUCTIONS AND EVIDENCE REVIEWED AT LENGTH.—Instructions to juries must be read and considered as a whole. Where the rule of proof of marriage was read from the Arizona Statute as an instruction to the jury as to what was proper and sufficient proof of marriage, and objection taken for the reason that the law of Arizona was not applicable to the case, if the principle laid down was correct—as it was—it is of no importance where the court obtained the words with which he announced the principle. Where the court instructed the jury in substance that even though the defendant had two wives in the territory of Utah, in violation of law, the fact that he had continued the same offense for many years, it being a continuous offense, would be no defense to him to make against

CRIMINAL LAW (Continued).

this prosecution. Although such instruction taken alone was ambiguous and susceptible of misconstruction by the jury and erroneous, yet, when read with positive instructions given with it, it appears that the jury could not have been misled, and there was no reversable error. Instructions and evidence reviewed at length. (United States v. Tenney, 127.)

20. CRIMINAL LAW—EDMUNDS ACT—PURPOSE OF--POLYGAMOUS MARRIAGES VOID—KNOWLEDGE THAT FIRST WIFE IS LIVING IMMATERIAL. Under no definition of marriage, as understood by Christian people, can polygamous unions be looked upon as marriages. These unions are what the Edmunds law aims to punish and suppress. It is not necessary in order to make out the offense, that the second marriage should be a valid one. Every bigamous or polygamous marriage is void, and it is the *entering into the* void marriage while a *valid* one is in existence that the law punishes. Neither has the knowledge of the fact that a prior wife was living anything to do with the question. (United States v. Tenney, 127.)

21. CRIMINAL LAW—PROSECUTION UNDER "EDMUNDS ACT"—INSTRUCTIONS AS TO CONSTITUENT ELEMENTS OF MARRIAGE CONTRACT AND METHOD OF PROOF—REFERENCE TO TERRITORIAL STATUTES PROPER IN INSTRUCTIONS WHEN TAKEN IN CONNECTION WITH OTHER PORTIONS OF CHARGE.—Where in prosecution under the "Edmunds Act," the court in instructing the jury as to the constituent elements of the marriage contract and the manner of the proof of polygamous marriages read par. 1891 and portion § 123, c. 10, Comp. Laws, defining marriage and the manner of proof of polygamous marriages, which statutes correctly embodied the essential points which would have been the law even in their absence, a reference to them is unobjectionable, when taken in connection with the other portions of the charge by which the jury were distinctly instructed that they must be satisfied that the first marriage existed and that the second marriage was contracted within the territory, within the time fixed by the United States Statute defining and punishing polygamy. (United States v. Tenney, 29.)

22. SAME—EVIDENCE—GENERAL REPUTATION AS CORROBORATIVE EVIDENCE IN PROOF OF MARRIAGE—IN ABSENCE OF FEDERAL STATUTE TERRITORIAL LAW GOVERNS RULE OF PROOF—SECTION 123, C. 10, COMP. LAWS 1871.—Evidence of general reputation as to the relation of husband and wife admissable as corroborative proof of marriage under territorial statute, *supra*, which in absence of congressional enactment governs rule of proof in criminal cases of this character. (United States v. Tenney, 29.)

CRIMINAL LAW (Continued).

23. SAME—SAME—CENSUS RETURN PROPERLY FILED EVIDENCE OF ITS CONTENTS—WITNESS REFRESHING RECOLLECTION—PRACTICE IN PROOF OF FACTS SHOWN BY CENSUS RETURNS.—Census return filed in the office of the secretary of the territory is by statute made an "official document," and evidence of its contents. A census enumerator may use his official returns to refresh his memory. The independent recollection of a census enumerator as to facts stated in his official returns and the official and authenticated returns correct method of proving facts shown by returns. (United States v. Tenney, 29.)

24. SAME—SAME—APPEAL AND ERROR—WHERE PARTY OPENS DOOR TO EVIDENCE NOT STRICTLY ADMISSABLE HE WILL NOT BE HEARD TO COMPLAIN ON APPEAL THAT HIS OPPONENT WAS PERMITTED TO FOLLOW.—Where the record shows that evidence as to facts occuring without the jurisdiction of the court and prior to the finding of the indictment was introduced by the defense the trial court is justified in allowing the prosecution to follow. The defense having opened the door it will not be heard to complain. (United States v. Tenney, 29.)

25. CRIMINAL LAW—RAPE—EVIDENCE—REPUTE FOR CHASTITY OF HOUSE WHERE PROSECUTING WITNESS THIRTEEN YEARS OF AGE LIVED IMMATERIAL.—The general bad reputation for chastity of the house where the prosecuting witness lived is immaterial where the record shows that she was thirteen years old, and lived alone with her mother. (Territory v. Richmond, 68.)

See Constitutional Law, 4; Forgery, 1.

CRIMINAL PRACTICE AND PROCEDURE. See Constitutional Law, 4; Criminal Law, 10.

CROPPING AGREEMENT.

1. CROPPING AGREEMENT—LANDLORD AND TENANT—PARTNERSHIP.—Where the agreement is that one, having no interest in the land owned by the other, shall farm it in consideration of his receiving a portion of the products, it is an ordinary cropper's contract, and creates neither the relation of landlord and tenant nor that of partners between the parties. (Romero v. Dalton, 210.)

CROSS EXAMINATION. See Criminal Law, 9.

CUSTOM. See Irrigation 6.

DAMAGES.

1. DAMAGES—$15,000 NOT EXCESSIVE—PRACTICE—REMISSION FROM JUDGMENT.—Where verdict and judgment were for $30,000 and on motion for new trial the court was of opinion that it was excessive to the amount of $15,000, and that sum, in open court, was remitted by plaintiff, and judgment was entered for $15,000, we do not deem that amount to be too much compensation for the loss of both legs by a healthy man of middle age. (Hobson v. R. R. Co., 171.)

See Irrigation, 13; Mines and Mining, 9; Telegrams, 1.

DE FACTO OFFICERS. See Office and Officers, 1; Public Lands, 3.

DEFAULT.

1. DEFAULT—SETTING ASIDE—NO ABUSE OF DISCRETION.—There is no abuse of discretion in the judge setting aside a default upon condition that the defendant go to trial immediately. Porter, J., dissenting. (McAllister and McCone v. Benson M. & S. Co., 350.)

DEGREE OF PROOF. See Criminal Law, 15.

DELIRIUM TREMENS. See Criminal Law, 6.

DELIVERY. See Sales, 1, 2.

DEMAND AND NON-PAYMENT, NOTICE OF. See Negotiable Instruments, 4; Pleading, 1.

DILATORY PLEAS AND MOTIONS. See Pleading, 2; Practice, 1.

DISMISSAL. See Appeal and Error, 16.

DRUNKENNESS. See Negligence, 1.

EASEMENTS. See Railroads, 1.

EDMUND'S ACT. See Criminal Law, 14, 16, 20, 21.

ELECTION CONTEST.

1. ELECTION CONTEST—ALLEGATIONS REVIEWED AND HELD INSUFFICIENT—QUALIFICATIONS OF VOTERS—NECESSITY FOR REGISTRATION—COMP. LAWS 1877, p. 237, par. 1412 CITED—POLLING PLACE IN IMPROPER PLACE—RETURNS NOT PROPERLY TRANSMITTED—OBJECT OF ELECTIONS—MERE IRREGULARITIES NOT AFFECTING RESULT WILL NOT BE CONSIDERED.—The petition fails to make out a

ELECTION CONTEST (Continued).

case for a contest of the election. It is alleged that certain persons voted who are not shown to be citizens on the great register. In this territory a person who has declared his intentions to become a citizen is a qualified voter. Statute, *supra*. A qualified voter may vote in any precinct in the County. *Idem, Supra*. If the polling place of an election be on an Indian or military reservation, where the place was well known and no interference with the election be alleged, it cannot invalidate the election. Allegations that the returns were not properly transmitted cannot avail, without allegation that they were tampered with. It is the object of elections to ascertain a free expression of the will of the voters. and no mere irregularity can be considered, unless it be shown that the result has been effected by such irregularity. (Territory v. Mohave County, 248.)

See Remedies, 1.

ELECTRIC CURRENT. See Mortgages, 1.

ENDORSER. See Negotiable Instruments, 3.

EQUITY.

1. EQUITY—JURY—VERDICT—ADVISORY.—Upon an issue out of chancery the verdict of a jury can be only advisory. (Clough v. Wing, 371.)

See Findings, 1; Public Lands, 1; Taxation, 5.

ERROR. See Appeal and Error.

ESTOPPEL.

1. ESTOPPEL—PARTY ASSERTING IN FAULT.—Where the party asserting an estoppel is guilty of a wrongful and deliberate infraction of the rights of the other party it should not be permitted to shield itself behind the doctrine. (Alta M. & S. Co. v. Benson M. & S. Co., 362.)

See Banks and Banking, 1; Irrigation, 3, 4; Mines and Mining, 2, 8; Principal and Surety, 1.

EVIDENCE.

1. EVIDENCE—DOCUMENTS OF WAR DEPARTMENT PROPERLY AUTHENTICATED EVIDENCE—REV. ST. U. S. 1878, § 886, CITED.—Copies of documents from the quartermaster's department of the war department properly authenticated by the auditor of the treasury are made evidence by §886 of the revised statutes, *supra*. (U. S. v. Ellis, 253.)

EVIDENCE (Continued).

See Army and Navy, 1; Attachment, 1; Criminal Law, 3, 5, 9, 13, 17, 22, 23, 25; Forgery, 1; Irrigation, 5, 11, 14; Mines and Mining 3, 4, 8; Negligence, 1; Set-Off and Counter-claim, 1; Sheriffs, 1.

EXECUTORS AND ADMINISTRATORS.

1. EXECUTORS AND ADMINISTRATORS—APPOINTMENT AND REMOVAL—IS PARTNER PROPER PERSON TO ACT AS ADMINISTRATOR—COMP. LAWS ARIZ. 1877, p. 262, par. 1569, subd. 11, CITED.—Where it appears that the administrator removed was jointly interested in certain law suits with decedent which said administrator was to prosecute and did prosecute under statute, *supra*, does it not make it doubtful whether or not he was the proper person to administer upon said estate? (Reilly v. Clark, 299.)

2. EXECUTORS AND ADMINISTRATORS—APPOINTMENT AND REMOVAL—COMP. LAWS ARIZ. 1877, p. 268, par. 1617, CITED—POWER OF REMOVAL DISCRETIONARY—APPELLATE COURT WILL NOT INTERFERE UNLESS ABUSE OF DISCRETION IS CLEARLY SHOWN.—The probate court has the power, under statute, *supra*, to remove an administrator upon the application of a non-resident heir, when the rights of those interested in the estate, shall, in the opinion of the court, require it. Appellate courts will not interfere with a probate judge in the exercise of his discretion in the removal of an administrator, unless he has clearly abused that discretion. (Reilly v. Clark, 299.)

See Fraudulent Conveyances, 1.

EXEMPTIONS. See Taxation, 1, 6.

EXPERT TESTIMONY. See Criminal Law, 8.

FALSE IMPRISONMENT.

1. FALSE IMPRISONMENT—WARRANT DESCRIBING PARTY BY FICTITIOUS NAME—UNITED STATES MARSHAL AUTHORIZED IN ARRESTING UNDER—ASSUMES RISK OF ARRESTING RIGHT MAN—MUST ACT IN GOOD FAITH AND EXERCISE DUE CARE.—The United States Marshal is justified in making the arrest of a defendant, within his territory, who is described in the warrant by a fictitious name. He assumes only the risk, in executing such warrant, of arresting the right man. If he acts in good faith and exercises due care, the defendant cannot complain. Section 1014 Rev. St. U. S. 1878 and § 89, Chapt. 11, Comp. Laws Ariz., 1877, Cited. (Tidball v. Williams, 50.)

FELLOW SERVANTS.

1. FELLOW SERVANTS—LOCOMOTIVE ENGINEER AND TEAMSTER WORKING ON GRADE—INSTRUCTIONS TO JURY CONCERNING.—Where the plaintiff's business was only to drive teams from the end of the line for the distribution of ties, and his work was not directly connected with the locomotive engineer, and he had nothing whatever to do with him save to be taken to and from his dinner under orders of his superior, he and the engineer were not fellow servants within the rule exempting the common employer from liability. Instructions to jury concerning the issue as to whether plaintiff and engineer were fellow servants reviewed and held correct. (Hobson v. R. R. Co., 171.)

FICTITIOUS NAME.

See False Imprisonment, 1.

FINDINGS.

1. FINDINGS—RESPONSIVE TO ISSUE—EQUITY—MAY GRANT LESS RELIEF THAN PRAYED IN COMPLAINT.—Findings that the amount of water appropriated was less than that claimed in the complaint are responsive to the issue raised by a denial of the allegation of appropriation. A court of equity is not bound by the exact measure of the relief asked, and may grant less in accordance with the proof. (Hill v. Lenormand, 354.)

FINDINGS OF FACT.

1. FINDINGS OF FACT—COMP. LAWS 1877, p. 436, par. 2618, CITED—PRACTICE—MANNER OF RAISING OBJECTION FOR INSUFFICIENCY—MUST BE RAISED BELOW—REVIEWED AND HELD SUFFICIENT.—Where there is an objection that there are no findings of fact in compliance with the statute, *supra*, and it appears that there are meager findings, and the record shows that the objection was not raised on motion for new trial or otherwise below, nor was the judge asked to make them more complete, the findings filed are sufficient, and authorities to the point that there must be findings have no application. (Solomon v. Norton, 100.)

See Public Lands, 2; Trial, 2.

FIXTURES.

1. FIXTURES—ERECTION OF BUILDING ON LEASED GROUND—EVIDENCE REVIEWED—NO PRESUMPTION UNDER CIRCUMSTANCES THAT IT BECAME ATTACHED TO REALTY—ACTS AND INTENT OF PARTIES IN PARTICULAR CASE USUALLY GOVERN—CHATTEL OWNED BY ONE PARTY AND AFFIXED TO LAND OF ANOTHER BUT CAPABLE OF SEVERANCE THEREFROM WITHOUT INJURY THERETO REMAINS PERSON-

FIXTURES (Continued).

ALTY.—Where the evidence is clear that a building was erected upon leased land, upon blocks set upon the ground, with the intention of removal, and that it was so removed after plaintiff was dispossessed without injury to the realty, no presumption can arise from the erection of the building, under the circumstances, that it became attached to the realty. There is no universal rule by which a court can decide, in the abstract, disputed claims as to what is or is not a fixture. Neither the mode of annexation nor the manner of use is in all cases conclusive. It must usually depend on the express or implied understanding of the parties concerned. Where the ownership of the land is in one person, and of the thing affixed to it in another, and in its nature is capable of severance without injury to the former, the latter cannot, in contemplation of law, become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal property only. (Nigro v. Hatch, 144.)

See Mortgages, 1.

FORCIBLE ENTRY AND DETAINER.

1. FORCIBLE ENTRY AND DETAINER—STATUTORY PROCEEDING—§ 3, 4, 5, 6, c. 43, COMP. LAWS 1877, CITED—FILING COMPLAINT WITH CLERK OF COURT AND ISSUANCE OF WARRANT BY HIM NOT A COMPLIANCE WITH STATUTE—IN SUMMARY PROCEEDINGS STATUTE MUST BE STRICTLY FOLLOWED.—Where a complaint in forcible entry and detainer was filed under statute, *supra*, with the clerk of the district court, and a *capias* issued by him bearing the teste of that court, such acts not being a compliance with the statute, the warrant issued and all proceedings thereunder are void. Summary proceedings of this character to be valid, must strictly follow the law which creates them. Their jurisdiction is limited. No intendments are in their favor. (Tweed v. Guild, 207.)

FORECLOSURE. See Mortgages, 1, 2, 3.

FORGERY.

1. FORGERY—EVIDENCE—TESTIMONY OF ACCOMPLICE—COMP. LAWS ARIZ. p. 137, par. 757, CITED—CORROBORATION—PRINCIPAL AND ACCESSORY.—Evidence of forgery in raising amount of county warrant reviewed and held sufficient. Where principal witness was an accomplice, and statute, *supra*, requires corroboration, evidence that defendant indorsed the warrant, received the money for the same, and made false entries in his books concerning it, is complete. In forgery he is the principal who directs the false writing to be made for his use, and utters the forged instrument. (Territory v. Barth, 319.)

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCES—EXECUTORS AND ADMINISTRATORS—NOT NECESSARY PARTY TO SUIT TO SUBJECT PROPERTY FRAUDULENTLY CONVEYED BY INTESTATE—COMP. LAWS ARIZ. 1877, p. 290, par. 1719-1720, CONSTRUED.—An executor is not a necessary party to a suit to subject property, fraudulently conveyed by his testator, to the payment of a debt of a judgment creditor. Statute, *supra*, construed. (O'Doherty v. Toole, 288.)

2. FRAUDULENT CONVEYANCES—FROM HUSBAND TO WIFE—CREDITORS MAY SUBJECT PROPERTY IN WIFE'S HANDS TO CLAIMS.—A conveyance of real estate by a husband to wife, in consideration of love and affection, is fraudulent as to creditors where the deed is unrecorded and the property is openly dealt with by the husband as his own, is assessed to him and he has paid the taxes thereon, and creditors may pursue such property into the wife's hands. (O'Doherty v. Toole, 288.)

3. FRAUDULENT CONVEYANCE—STATUTE OF FRAUDS—COMP. LAWS 1877, p. 363, par. 2133, CONSTRUED.—§20 of chap. 36 of the Compiled Laws, *idem supra*, is a limitation upon the absolute right of disposition of property by its owner in that he may not sell and convey his property if in so doing he have the express or implied intent to hinder, delay or defraud his creditors. (Rochester v. Sullivan, 75.)

4. SAME—ASSIGNMENT FOR BENEFIT OF CREDITORS—BURDEN OF PROOF OF FRAUDULENT INTENT ON CREDITOR ATTACKING CONVEYANCE—CONSTRUCTION OF SUCH CONVEYANCES—FAILING DEBTOR MAY ASSIGN FOR BENEFIT OF CREDITORS—ASSIGNMENT VOID IF FRAUDULENT INTENT BE PROVED OR THE ASSIGMENT SHOWS AN ACTUAL FRAUD.—Where it is charged that a conveyance is of this character, the onus is upon the creditor who assails the assignment to show that it is in plain violation of the law. The same fair and reasonable rules of construction must be applied to such conveyances as are adopted in ascertaining the meaning of other instruments. The doctrine that a man in failing circumstances may assign his property for the benefit of all his creditors, provided he does so in good faith, has become too well established to now be questioned. If, however, a fraudulent intent be proved, or if the terms of the assignment itself show that a fraud has actually been committed the assignment is in violation of the statute and void. (Rochester v. Sullivan, 75.)

5. SAME—CONSTRUCTION—PROVISION FOR POSSESSION BY GRANTOR OF REAL ESTATE NOT PRESUMPTIVE FRAUD—RULE AS TO RETENTION OF POSSESSION IN TRANSFERS OF REAL PROPERTY DIFFERENT FROM

FRAUDULENT CONVEYANCES (Continued).

TRANSFERS OF PERSONAL PROPERTY—UNREASONABLE DELAY IN SELLING ASSIGNED PROPERTY—ONE YEAR REASONABLE TIME.—Where a conveyance of real property is made to a trustee for the benefit of the creditors of the grantor, with a provision for possession by the vendor, such provision is not presumptive evidence of fraud, though it would be had personal property been assigned. To hold otherwise would be in effect to abolish the distinction between personal and real property, and to lose sight of the different methods of conveying the title to the two kinds of property. It is the law that the postponment to an unreasonable time of the time of sale will avoid the assignment. Less than one year is not unreasonable. (Rochester v. Sullivan, 75.)

6. SAME—WHERE ASSIGNMENT SHOWS THAT THE PROPERTY IS TO BE DEVOTED TO THE PAYMENT OF ALL DEBTS OF GRANTORS AND THERE IS NO EVIDENCE OF FRAUD IN FACT PRESUMPTION IN FAVOR OF VALIDITY.—Where an assignment places the property in the hands of a trustee to be devoted to the payment of all the debts of the grantors, with no evidence of fraud in fact, the court must assume that it was made in good faith, and for the benefit of the creditors, rather than for their injury, and the court cannot say that it is fraudulent as a matter of law. (Rochester v. Sullivan, 75.)

GRAND JURY.

1. GRAND JURY—IMPANELING—EXCUSING JUROR—PRESUMPTION IN ABSENCE OF FACTS ON APPEAL THAT COURT ACTED PROPERLY—COMP. LAWS ARIZ. 1877, p. 120, par. 590, and p. 121, par. 592, CITED.—Where a juror was excused by the trial court, in the absence of the facts, this court will presume that the court acted properly. Statutes cited, *supra*. (Territory v. Barth, 319.)

HARMLESS ERROR. See Appeal and Error, 6, 7.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—POWER OF MARRIED WOMEN TO CONTRACT—EMANCIPATED IN 1864 BY COMP. LAWS 1877, p. 327, par. 1960, 1961, 1962, and 1963—REPEALED BY IMPLICATION IN 1865 BY COMP. LAWS 1877, p. 328-332, par. 1967-1999, WHICH ENACTED THE COMMUNITY SYSTEM—REPEALED IN PART IN 1871 BY COMP. LAWS, p. 332, par. 2000, WHICH PROVIDES MARRIED WOMEN SHALL HAVE EXCLUSIVE CONTROL OF SEPARATE PROPERTY—MILLER V. FISHER, 1 ARIZ. 232, 25 Pac. 651, CRITICIZED AND DISTINGUISHED—ACT OF 1865 AND 1871 TO BE CONSTRUED TOGETHER WITHOUT REGARD TO ACT OF 1864 REPEALED—WOFFENDEN V. CHAROULEAU, ANTE, p. 89, 11 Pac. Rep. 117, CHAROULEAU V. WOFFENDEN, 1 ARIZ. 243, 25 Pac. Rep.

HUSBAND AND WIFE (Continued).

652, AND WOFFENDEN V. CHAROULEAU, 1 ARIZ. 346, 25 Pac. Rep. 662, CITED AND APPROVED.—In 1864 (Comp. Laws, 1877, 327) was enacted chapter 32 of the Compiled Laws, *supra*, which completely emancipated a married woman, but in 1865, *supra*, there was enacted "An act amendatory of chapter 32, Howell Code," which, although it does not in terms amend the former law, and has no repealing clause, is a complete code of the law of husband and wife, so far as their property is concerned, and must be held to repeal the act of 1864 by implication. This statute enacted for this territory the community system—*communio bonorum*—which is founded in the civil law. It has no dower or courtesy. By that law the property of husband and wife owned before marriage, or acquired thereafter by gift, etc., is separate property; all property acquired after marriage other than by gift, etc., is common property; the husband has power of management and control of separate property of wife, but cannot sell it except by writing signed by both husband and wife, and has entire management and control of common property, with absolute power of sale and the rents and profits of separate property become common property. This system established in 1865, remained unchanged until 1871, when the statute, *supra*, which provides that "married women of the age of twenty-one years and upwards shall have the sole and exclusive control of their separate property;" and may convey lands without being joined by their husbands, was passed, repealing so much of the act of 1865 as is in conflict with it, and no more. *Miller* v. *Fisher*, *supra*, approved in holding that married woman may make valid contract for sale of personal property; and disapproved in reasoning that the act of 1871 by repealing part of act of 1865 thereby revived the act of 1864; *Held*, that act of 1865 and 1871 must be construed together without regard to the act of 1864 which must rest repealed. *Woffenden* v. *Charouleau* cases, *supra*, approved in holding that the rents and profits of the separate estate of the wife are her separate property. (Stiles v. Lord, 154.)

2. SAME—POWER OF MARRIED WOMAN TO CONTRACT—UNDER ACT OF 1871 MAY SELL LAND OR PERSONALTY BELONGING TO SEPARATE ESTATE—NEGOTIABLE INSTRUMENTS—MARRIED WOMAN, UNDER ACT SUPRA, HAS NO POWER TO MAKE CONTRACT OF INDORSEMENT—MAY NOT MAKE CONTRACT OF GUARANTY—MARRIED WOMEN'S ACTS TO BE LIBERALLY CONSTRUED—STATUTE DOES NOT EMPOWER HER TO CONTRACT GENERALLY.—Under act of 1871 a married woman has the power to sell her separate property without her husband joining. It is not necessary to the transfer of a promissory note that she have the power to enter into contract of indorsement, and under such statute a wife's indorsement of a bill or note is inoperative beyond divesting her of her title therein. Neither may she make a contract

HUSBAND AND WIFE (Continued).

of suretyship or guaranty. Married women's acts are to be construed liberally, to further the objects to be attained. But the law does not empower her to contract generally and it cannot be extended to the making of contract of endorsement. (Stiles v. Lord, 154.)

3. HUSBAND AND WIFE—RENTS AND PROFITS OF EITHER HUSBAND'S OR WIFE'S SEPARATE ESTATE COMMUNITY PROPERTY UNDER STATUTE.—Under §9, *supra*, rents and profits of the separate estate of either husband or wife are common property. (Woffenden v. Charouleau, 45.)

4. SAME—RULE STATED CHANGED BY ACT NO. 5, LAWS OF 1885, *Supra*.—The legislature of 1885 changed and settled the law for the future to be that the rents, issues, and profits of the separate estate of either husband or wife are separate property. (Woffenden v. Charouleau, 45.)

5. HUSBAND AND WIFE—SEPARATE ESTATE—WIFE HAS RIGHT TO CONVEY OR LEASE—RENTS AND PROFITS ARE SEPARATE ESTATE—"MARRIED WOMAN'S ACT" OF 1871 CONSTRUED (par. 2000, p. 332, Comp. Laws 1877)—MILLER v. FISHER, 1 ARIZ. 232, 25 Pac. 651, CHAROULEAU v. WOFFENDEN, 1 ARIZ. 346, 25 Pac. 662, CITED AND APPROVED—STARE DECISIS—WOFFENDEN v. CHAROULEAU, ANTE, 44, 8 Pac. 302, REVIEWED AND DISAPPROVED IN PART.—Under "Married Woman's Act" of 1871, a married woman may convey or lease her separate real estate, and may enforce such lease by collecting rents, and the rents so collected are her separate property. Cases, *supra*, reviewed and approved. Where opinions of this court have stood for more than ten years and have become a settled rule of property upon the faith of which rights have become established, and to overrule them would work confusion, rule of *stare decisis* should be invoked. Woffenden v. Charouleau, *ante*, 44, 8 Pac. 302 reviewed, and, so far as question of ownership of rents and profits is discussed, held *obiter dicta*, and disapproved. (Woffenden v. Charouleau, 91.)

INDICTMENT. See Criminal Law, 16.

INJUNCTION. See Irrigation, 8.

INSANITY. See Criminal Law, 6, 8.

INSTRUCTIONS. See Appeal and Error, 8; Criminal Law, 2, 11, 12, 15, 19, 21; Fellow Servants, 1; Trial, 3.

INTENT. See Fraudulent Conveyances, 4; Irrigation, 14.

INTEREST.

1. INTEREST—COMP. LAWS ARIZ. 1887, p. 574, par. 3450, CONSTRUED—CONTRACT FOR CONSTRUCTION OF RAILROAD "INSTRUMENT IN WRITING" AND BEARS INTEREST UNDER STATUTE.—Contract between plaintiff and defendants for construction of railroad is an instrument in writing within meaning of statute, *supra*, and bears interest. (Simms v. Hampson, 233.)

INTOXICATING LIQUORS.

1. INTOXICATING LIQUORS—LICENSE—UNIFORMITY—R. S. ARIZ. 1887, p. 396, par. 2239 and p. 395, par. 2236, CONSTRUED AND HELD CONSTITUTIONAL.—Statues, *supra*, providing that the rate of license for a liquor dealer be fixed at $50 per quarter, and that the rate for wayside inns be $10 per quarter, and that apothecaries and physicians be exempt, and for punishment for violation of the law, are not void for want of uniformity, being uniform as to each class, and the classification is reasonable and within the power of the legislature to make. (Territory v. Connell, 339.)

IRRIGATION.

1. IRRIGATION—ACTION FOR WRONGFUL DIVERSION—PARTIES—WATER USER THOUGH NOT DITCH-OWNER MAY MAINTAIN ACTION FOR WRONGFUL DIVERSION — DITCH-OWNER NOT NECESSARY PARTY PLAINTIFF.—The owners of land irrigated by means of a ditch owned by another person, or a corporation, may have an action against one who wrongfully diverts water from the ditch. (Clifford v. Larrieu, 202.)

2. SAME—DITCH-OWNER HAS RIGHT TO TOLL—WATER-USER TO WATER UPON PAYMENT OF TOLL.—Though the owners of the ditch be entitled to toll for the water, the owners of the land are entitled to the water on the payment of the toll. (Clifford v. Larrieu, 202.)

3. IRRIGATION—ESTOPPEL BY CONDUCT.—Parties will not be permitted to stand by for sixteen years or more and see new fields brought into cultivation and improvements made under circumstances which showed that the persons making them believed they had an equal right to the use of water and then be heard to complain. Acquiescence, or non-action, for so long a time gives consent. (Dalton v. Re taria, 275.)

4. IRRIGATION—ESTOPPEL IN PAIS, AND TITLE BY LIMITATION AND PRESCRIPTION SIMILAR.—With reference to the rights acquired in the use of water, estoppel in *pais*, and title by limitation and pre-

IRRIGATION (Continued).

scription, are very similar; and the latter two, to real estate, are practically synonymous. (Dalton v. Rentaria, 275.)

5. IRRIGATION—EVIDENCE AS TO PRIOR RIGHT DISTINGUISHED FROM EVIDENCE AS TO PRIOR USE.—The evidence shows that the defendants had the prior right yet the plaintiffs had the *use* of said waters. Most of defendants' testimony was as to *prior right* and not as to *prior use* of said water. (Dalton v. Rentaria, 275.)

6. IRRIGATION—PRIOR RIGHT TO USE OF WATER BARRED BY ADVERSE USER—DISTRIBUTION OF WATER—CUSTOM.—Adverse user of water for three times the statutory period of limitations in this territory ripens into vested right to the use of water. Where the evidence in the case shows a custom in the distribution of water, and that custom was certain, definite, uniform and notorious, and had been acquiesced in for more than 16 years, it has acquired sufficient age to give it the force and sanction of law. (Dalton v. Rentaria, 275.)

7. IRRIGATION—FAILURE OF CANAL COMPANY TO DELIVER WATER—CONTRACT LIMITING LIABILITY—NOT BINDING UPON WATER USERS UNLESS ACCEPTED—WHERE MONEY IS ACCEPTED FOR WATER WITHOUT CONTRACT EVEN THOUGH WATER USER HAVE KNOWLEDGE OF ITS TERMS HE IS NOT BOUND THEREBY.—Where plaintiff sues an irrigating company for damages for failure to deliver water, the fact that the irrigating company required appliants for water to sign a certain form of contract, limiting its liability in certain cases, and providing for a *pro rata* distribution of water in times of scarcity, is no defense. Such contract is not binding upon plaintiff where it appears that the company received his money without its execution, even thought the plaintiff had knowledge as a former director of the company of its terms. (Gray v. Salt River Valley Canal Co., 225.)

8. IRRIGATION—INJUNCTION TO RESTRAIN DIVERSION—DENIED WHERE NO INJURY SHOWN—WATER SUFFICIENT FOR BOTH PARTIES.—Where the evidence shows that at all times there was sufficient water for the lands of both parties, plaintiff has no right to injunction restraining defendant from diversion and use of water. (Clough v. Wing, 371.)

9. SAME—APPROPRIATION—BENEFICIAL USE MEASURE OF RIGHT—REASONABLE USE—SUBSEQUENT APPROPRIATORS.—An appropriator of water for irrigation is entitled to so much water only as is necessary to irrigate his land, and is bound to make a reasonable use of it. Subsequent appropriators' rights to the residue of the stream or to the whole thereof at times the water is not needed by prior appropriators complete. (Clough v. Wing, 371.)

IRRIGATION (Continued).

10. SAME—COMMON LAW—RIPARIAN RIGHTS DO NOT EXIST—USE OF WATER FOR IRRIGATION—REV. ST. U. S. 1878, SEC. 2339-2340; COMP. LAWS ARIZ. 1877, par. 3240-42-43, CITED—COMMON LAW INAPPLICABLE TO RIGHT TO USE OF WATER.—The riparian rights of the common law do not exist in this territory. All right in water in non-navigable streams in Arizona is subservient to use in tilling the soil. This principle is recognized by Acts of Congress, *supra*, and by the legislature in par. 3240-42-43. The Territory of Arizona was formerly subject to the laws of Mexico and the common law was unknown; and that law so far as applicable to the uses of water is not suited to the conditions that exist here. (Clough v. Wing, 371.)

11. SAME—EVIDENCE—LOCAL CUSTOMS—JUDICIAL KNOWLEDGE.—"Local customs" in reference to the use of water do not require proof. The courts take knowledge of them as of the public laws. (Clough v. Wing, 371.)

12. SAME—APPROPRIATION—DEFINED.—What constitutes an appropriation is largely a question of fact. Appropriation is the intent to take, accompanied by some open, physical demonstration of the intent and for some valuable use. (Clough v. Wing, 371.)

13. IRRIGATION—MEASURE OF DAMAGES FOR FAILURE TO DELIVER WATER.—Considering the loss of the rent of land from the tenants, and what was a fair rental value of the land upon which a crop was prevented by reason of there being no water, the amount of the verdict held not excessive. (Gray v. Salt River Valley Canal Co., 223.)

14. IRRIGATION—NOTICE OF APPROPRIATION—EVIDENCE—EFFECT OF—REASONABLE TIME FOR COMPLETION OF WORK—EVIDENCE OF INTENT TO APPROPRIATE.—While mere posting of notice of appropriation, unaccompanied by work, is insufficient to constitute an appropriation, yet it tends to show that, in accordance therewith, the work was done. Where one has done no work, but has taken all the preliminary steps for the construction of his ditch, he should have a reasonable time therefor. The building of a house on land worthless without water is evidence of intent to appropriate. (Dyke v. Caldwell, 394.)

See Water and Water Courses, 1.

JOINT DEBTORS.

1. JOINT DEBTORS—RELEASE—REV. ST. ARIZ. 1887, SEC. 133, CITED.—A release of the former firm by the depositor does not operate as a release of the latter upon the principle that the release of one

JOINT DEBTORS (Continued).

joint debtor is a release of all. Statute, *supra*, repeals this doctrine and enacts that the release of one joint debtor does not release the other. The contracts of each firm were separate obligations. (Starr v. Stiles, 436.)

JUDGMENT.

1. JUDGMENT—PRESUMPTION IN FAVOR OF REGULARITY—WHERE RECORD IS NOT CERTIFIED TO AS COMPLETE AN OBJECTION THAT CAUSE WAS NOT AT ISSUE WILL BE DISREGARDED THOUGH THE TRANSCRIPT BE SILENT AS TO WHETHER ANSWER OR PLEA WAS EVER FILED.—Where it is urged that the judgment is erroneous because no plea or answer was ever filed, and the transcript is silent upon the question but is not certified to as being completed, the presumption in favor of the regularity of the judgment will induce the court to disregard the objection. (Solomon v. Norton, 100.)

See Appeal and Error, 4, 9; Verdict, 1.

JUDICIAL KNOWLEDGE. See Irrigation, 11.

JURORS.

1. JURORS—COMPETENCY OF—IMPRESSIONS FROM RUMOR AND NEWSPAPER ACCOUNTS—SUCH OPINION DOES NOT DISQUALIFY.—Where the opinion of the juror does not seem to be founded on any evidence at all, and is nothing more than a mere impression based upon what he has heard in the streets or read in the newspapers, such opinion can never be held to disqualify a juror at the present day. (Territory v. Davis, 59.)

See Grand Jury, 1.

JURY.

1. JURY—MISCONDUCT OF—USE OF INTOXICANTS—ACTUAL INTOXICATION DISQUALIFIES—PARTY FURNISHING SAME CANNOT COMPLAIN WHERE ACTUAL INTOXICATION DOES NOT RESULT—VERDICT WILL NOT BE DISTURBED WHERE INTOXICANTS USED HAD NO INFLUENCE ON JURY.—Intoxication will disqualify a juror from the performance of his duty and amounts to misconduct. Where both parties prepared a feast for the jury at which liquors were served neither party can be heard to complain of the act and performance which they jointly inaugurated, without proof of intoxication to the extent of disqualifying the jury, or some members thereof, for a proper discharge of duty. Courts will not disturb a verdict when satisfied that intoxicating liquors had no influence upon the jury. (Copper Queen Min. Co. v. Arizona Prince Cop. Co., 10.)

See Equity, 1.

LACHES. See Taxation, 5.

LANDLORD AND TENANT. See Cropping Agreement, 1.

LAND OFFICE. See Public Lands, 1.

LICENSE. See Intoxicating Liquors, 1.

LIMITATION OF ACTIONS.

1. LIMITATION OF ACTIONS—CLAIMS AGAINST ESTATES—COMP. LAWS ARIZ. 1877, p. 274, par. 1647, CONSTRUED—CONSTRUCTION OF STATUTES OF LIMITATIONS.—Failure to present a judgment claim against a decedent within the ten months allowed by the statute, *supra*, forever bars it as a claim against the estate proper. In the construction of statutes of limitation appertaining to various subjects reference should always be had to the object designed to be accomplished in fixing each period of limitation. It does not bar an action to subject property to judgment which was and is a specific lien upon property fraudulently conveyed by decedent to his wife, such conveyance being good as between the parties and divesting the estate of title. (O'Doherty v. Toole, 288.)
2. LIMITATION OF ACTIONS—DEPOSITS IN BANK—STATUTE RUNS FROM DEMAND.—When a bank holds the funds of a depositor subject to call at any time, the contract is to pay on demand, and the statute of limitations does not begin to run until demand. (Starr v. Stiles, 436.)
3. LIMITATIONS OF ACTIONS—ENFORCEMENT OF TRUST—WHEN ACTION ACCRUES.—Where H. was made trustee of the title to certain mines for the purpose of organizing a corporation and distributing the stock among the owners after disposing of a certain part for working capital, the grantors were entitled to their stock when the Company was organized and this stock set apart to this purpose. The statute of limitations does not begin to run in such a case. H. holds this stock in trust for the plaintiffs. (Philes v. Hickies, 407.)

LOCAL CUSTOMS. See Irrigation.

LOCAL OPTION LAWS.

1. LOCAL OPTION LAWS—VALIDITY.—The tendency of authority and practice is evidently toward a recognition of their validity. Fence laws, stock laws, liquor laws, in fact a great number of local option laws, have been enacted and sustained by the courts. (Territory v. Mohave Co., 248.)

LOCATION NOTICE. See Mines and Mining, 4.

MANDAMUS.

1. MANDAMUS—SCOPE OF—DEFINED BY COMP. LAWS 1877, p. 480, par. 2905.—Our statute seems to have codified the law of this subject. Mandamus may be issued "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled." Statute, *supra*. (Territory v. Mohave County, 248.)

See Remedies, 1.

MARRIAGE. See Criminal Law, 17.

MARRIED WOMEN. See Husband and Wife, 1, 2.

MECHANIC'S LIEN.

1. MECHANIC'S LIEN—SMELTER WITHIN STATUTE.—A smelter is a "mill or manufactory" within the intent and meaning of the statute concerning mechanic's liens. (McAllister & McCone v. Benson M. & S. Co., 350.)

MINES AND MINING.

1. MINES AND MINING—APPLICATION FOR PATENT BECOMES PRIVATE PROPERTY—NECESSITY FOR ANNUAL ASSESSMENT WORK.—After the entry of a mining claim for patent and the issuance of the certificate of purchase the land covered thereby becomes private property, the contract of purchase being complete when the certificate of entry was executed and delivered, and thereafter annual assessment work is unnecessary. (Alta M. & S. Co. v. Benson M. & S. Co., 362.)

2. MINES AND MINING—ESTOPPEL BY DEED—RELOCATION—PARAMOUNT TITLE.—A person conveying a mining claim is estopped to deny the validity of the location. Relocation by grantor on the theory that the original location is invalid void as against grantee. If grantee had failed to do assesment work a valid relocation could be made by grantor and paramount title acquired from the United States. (Blake v. Thorne, 347.)

3. SAME—PLEADING—EVIDENCE—NECESSITY OF PLEADING AND PROVING VALID ORIGINAL LOCATION IN SUIT TO QUIET TITLE AGAINST ONE ESTOPPED TO QUESTION.—In a case where defendant is estopped to question the original location plaintiff claiming under it need not allege or prove its validity. (Blake v. Thorne, 347.)

MINES AND MINING (Continued).

4. MINES AND MINING—LOCATION NOTICE—UNCERTAINTY—EVIDENCE—AIDER BY EXTRINSIC EVIDENCE—AMENDMENT WHERE OTHER RIGHTS HAVE INTERVENED DOES NOT RELATE BACK.—A location of a mining claim, to fix the title as against after acquired rights by entry and patent, should be sufficiently clear to designate the ground claimed, and should be marked on the ground by monuments, showing the extent of the possession. If the location on its face be uncertain, the uncertainty could be aided by evidence of the possession, or of monuments; but a location notice, on its face uncertain and without evidence of what land was occupied, cannot be evidence for any purpose. An amendment, afterwards made, describing different land, or making certain what was uncertain, cannot revert back to the original defective location. (Reilly v. Berry *et al.*, 272)

5. MINES AND MINING—MORTGAGE OF MINING CLAIM—ABANDONMENT OF LOCATION BY MORTGAGORS CANNOT DEFEAT MORTGAGE.—After the delivery of a certificate of sale under foreclosure of mortgage upon mining claims an attempt on the part of the mortgagors to abandon the location, so that re-locations might be made to defeat the lien of the mortgage, is void, all rights of the mortgagors having passed to the purchasers under foreclosure, and the re-locations made pursuant thereto vest no title. (Alexander *et al.* v. Sherman *et al.*, 326.)

6. SAME—MINING CLAIMS PROPERTY—MAY BE DEALT WITH AS OTHER PROPERTY—LIENS THEREON PROTECTED.—Mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged and inherited. If mortgaged, the rights of the mortgagees shall be protected against any attempt of the mortgagors to defeat them by abandonment, and courts of equity should protect these liens as fully as securities upon any other species of property. (Alexander *et al.* v. Sherman *et al.*, 326.)

7. MINES AND MINING—QUESTION AS TO LAND BEING MINERAL RES ADJUDICATA UPON ISSUANCE OF PATENT.—Whether lands are as a matter of fact mineral lands is *res adjudicata* by the patent to the mining claim. (Reilly v. Berry *et al.*, 272.)

8. MINES AND MINING—SALE—RECOVERY OF CONSIDERATION—DEFENDANT ESTOPPED TO DISPUTE TITLE—EVIDENCE OF LOCATION AND ASSESSMENT WORK.—Where grantors seek to recover the consideration for the transfer of unpatented mining claims a defendant holding under them, with knowledge of their title, cannot dispute it and such grantors need not show that they had complied with

MINES AND MINING (Continued).

the mining laws in the matter of location of claims and annual labor thereon. (Philes v. Hickies, 407.)

9. MINES AND MINING—WRONGFUL CONVERSION OF ORE—MEASURE OF DAMAGES.—Just compensation is the rule of damage generally applicable in cases of trover and conversion, and in an action for damages for conversion of ores the value of the ore when broken down at the mine, making no allowance for the labor expended in mining, is a proper measure of damage. (Alta M. & S. Co. v. Benson M. & S. Co., 362.)

See Public Lands, 5; Taxation, 2.

MINING PATENT. See Mines and Mining.

MORTGAGES.

1. MORTGAGES—ELECTRIC LIGHT PLANT—POLES AND WIRES AS FIXTURES—FIXTURES DEFINED—EXCEPTIONS IN FAVOR OF TENANTS AND TRADE DO NOT CHANGE RULE—QUICQUID PLANTATUR SOLO, SOLO CEDIT REMAINS THE RULE AS BETWEEN VENDOR AND VENDEE AND MORTGAGOR AND MORTGAGEE—A CHATTEL MAY BE A FIXTURE THOUGH OFF THE LAND—MORTGAGE CONVEYED LOT WITH MACHINERY AND APPURTENANCES—LANGUAGE COVERED ELECTRIC CURRANT AS APPURTENANCE EVEN THOUGH NOT A FIXTURE—WHETHER CHATTEL BE FIXTURE OR APPURTENANCE IN EACH CASE CONCLUSION IS MIXED ONE OF LAW AND FACT TO BE DETERMINED FROM INTENTION OF PARTIES AND USES TO WHICH CHATTEL IS DEVOTED—IN THIS CASE CHATTEL BECAME PART OF REALTY AND PASSED WITH MORTGAGE.—An electric light plant was placed upon a certain lot and poles and wires for the purpose of delivering the current generated thereby were placed upon the streets of the city. The lot was mortgaged, "together with all machinery, including the boiler, engine and dynamo now situated on said land, and together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining." It is urged that the said wires are a fixture to the lot, and as such pass with the mortgage. A fixture is an article which was a chattel, but which, by being physically annexed or affixed to the realty, became accessory to it, and a part and parcel of it. The fact that there are exceptions to the rule in favor of tenants as against landlords, and in favor of trade, does not change the definition. *Quicquid plantatur solo, solo cedit,* the maxim of the common law, as between vendor and vendee, and mortgagor and mortgagee, remains to-day unchanged. The later and better doctrine does not require an actual fastening to the soil as essential to making a chattel a fixture. It may be a fixture even though off the land. The electric

MORTGAGES (Continued).

current is an appurtenance to the machinery situated on the lot, and is therefore covered by the language of the mortgage even though not a fixture. Whether a particular chattel has become a "fixture" or an "appurtenance" is a mixed question of law and fact, largely to be determined by the intention of the parties, and the uses to which the chattel is devoted. In this case it was the evident intention of the parties to make this electric current a part of the machine mortgaged and attached to the land,—to become a part of the realty. *Held*, that the chattel so attached passed with the mortgage. (Fechet v. Drake, 239.)

2. MORTGAGES—FORECLOSURE—DEFAULT IN PAYMENT OF INTEREST—COMP. LAWS ARIZ., p. 448, par. 2686, CITED.—Where a mortgage, on failure to pay the principal or interest, gives power to sell the premises and retain the principal and interest, on default in the payment of interest the mortgage may be foreclosed and the principal and interest recovered, though the principal be not yet due. Statute cited, *Supra*. (Hooper v. Stump, 262.)

3. MORTGAGES—FORECLOSURE—WRIT OF ASSISTANCE—GRANTING IMPROVIDENT WHERE PARTIES IN POSSESSION CLAIM PARAMOUNT TITLE AND ARE NOT CONCLUDED BY FORECLOSURE PROCEEDINGS—WHEN PROPER—PRACTICE.—Where persons, not parties to foreclosure proceedings nor concluded thereby, claiming under paramount title, are in possession of mortgaged mining claims, it is improper for the court to determine the question of right of possession and title upon affidavits filed on application for a writ of assistance. These matters can only be settled in a suit for that purpose and the persons in possession are entitled to their day in court It is only where a party concluded by foreclosure proceedings, refuses to give up possession on demand that a writ of assistance is proper. This, and that the party *is in fault* must be shown on the application for the writ. (Asher v. Cox, 71.)

See Mines and Mining, 5.

NEGLIGENCE.

1. NEGLIGENCE—EVIDENCE—DRUNKENNESS OF ENGINEER—HABITUAL INTOXICATION—GENERAL REPUTATION AS TO RECKLESSNESS AND DRINKING INADMISSIBLE.—Evidence that the engineer was drunk or under the influence of liquor, at the time, admissible as part of the *res gestae*. Evidence tending to show that the engineer was habitually intoxicated, and a reckless "runner," competent as tending to show that at the time alleged he handled his engine negligently. Evidence that his engineer was reputed to be a reck-

NEGLIGENCE (Continued).

less runner, and in the habit of becoming intoxicated, inadmissible. (Hobson v. R. R. Co., 171.)

2. NEGLIGENCE—PLAINTIFF GUILTY OF DANGEROUS ACT—SUCH ADMITTED FACT DOES NOT DEPRIVE HIM OF RIGHT TO HAVE CASE SUBMITTED TO JURY—GENERAL RULE AS TO WHAT ADMITTED FACTS ARE FOR THE JUDGMENT OF COURT—WHERE ULTIMATE FACT TO BE PROVEN IS TO BE DEDUCED FROM ADMITTED FACTS, CASE SHOULD GO TO JURY—MOTION FOR NON-SUIT PROPERLY DENIED.—Quere, whether the plaintiff, in getting upon the car, as stated by himself, was guilty of an act evidently dangerous, and in so doing was guilty of such negligence as should preclude him from having a verdict as a matter of law? It is true, in many cases, that, where the facts are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question, rather than where deduction or inferences are to be made from the facts. In some cases, too, the necessary inference from the proof is so certain that it may be ruled upon as a question of law. Extreme cases cited. The range between them is almost infinite in variety and extent. Upon the facts proven in such cases it is a matter of judgment and discretion—or sound inference—what is the deduction to be drawn from the undisputed facts. It is this class of cases and those akin to it, that the law commits to the jury. Held that this case should have gone to the jury, and that the motion for non-suit was properly denied. (Hobson v. R. R. Co., 171.)

3. SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF OF ON DEFENDANT—PLAINTIFF MUST ESTABLISH CULPABILITY OF DEFENDANT BUT NEED NOT PROVE HIS OWN CONDUCT TO HAVE BEEN PRUDENT—ABSENCE OF FAULT ON PART OF PLAINTIFF MAY BE INFERRED FROM CIRCUMSTANCES AND DISPOSITION OF MAN TO KEEP OUT OF DANGER.—Plaintiff having made a *prima facie* case, it was incumbent on defendant to prove a want of care on plaintiff's part to defeat the action. It is not a rule of universal application that the plaintiff must prove affirmatively that his conduct on the occasion of the injury was cautious and prudent. The culpability of the defendant must be proved affirmatively before the case can go to the jury; but the absence of any fault on the part of the plaintiff may be inferred from circumstances, and the disposition of men to take care of themselves, and keep out of difficulty, may properly be taken into consideration. (Hobson v. R. R. Co., 171.)

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE INSTRUMENTS—ORDER BY CORPORATE OFFICER ON DISBURSING OFFICER—NO ACCEPTANCE NECESSARY TO BIND CORPORATION

NEGLIGENCE (Continued).

—MAY BE TREATED AS EITHER NOTE OR BILL OF EXCHANGE.—Where an order for the payment of money is drawn by an officer of a corporation having authority to incur indebtedness upon a disbursing officer of the same corporation no acceptance is necessary to bind the corporation. Such an order may be treated by the holder as either a promissory note or bill of exchange. (Western Mining Co. v. Toole, 82.)

2. SAME—GENUINENESS—PRINCIPAL AND AGENT—PRINCIPAL BOUND BY ACTS OF AGENT WITHIN SCOPE OF APPARENT AUTHORITY IMPLIED FROM COURSE OF BUSINESS DEALING—MAXIM THAT HE WHO, WITHOUT INTENTIONAL FRAUD, HAS ENABLED A PERSON TO DO AN ACT WHICH MUST BE INJURIOUS TO HIMSELF, OR TO ANOTHER INNOCENT PARTY, SHALL HIMSELF SUFFER THE INJURY, RATHER THAN THE INNOCENT PARTY WHO HAS PLACED CONFIDENCE IN HIM, APPLIED.—In a case where a bank in discounting a draft inquires concerning its validity of the bookkeeper of the corporation upon whom drawn, and the bookkeeper undertakes to say that it is genuine and will be paid when due, and it appears that such bookkeeper has in the ordinary course of business with such bank been accustomed to pass upon the validity of similar drafts, and has every opportunity to determine their validity, and in the absence of the superintendent has paid them, even though such bookkeeper have no express authority to pass upon the validity of the draft, such act is within the apparent scope of his authority as determined by his former course of dealing on behalf of his principal, and his principal will be bound. The maxim of natural justice here applies with its full force, that he who, without intentional fraud, has enabled any person to do an act which must be injurious to himself, or to another innocent party, shall himself suffer the injury, rather than the innocent party who has placed confidence in him. (Western Mining Co. v. Toole, 82.)

3. NEGOTIABLE INSTRUMENTS—PAYEE ENDORSING FOR DISCOUNT NOT CO-MAKER BUT ENDORSER.—Where the transaction is no other than the ordinary discount by the payee of the note by indorsement the payee, by writing his name on the back of the note, becomes not a co-maker but an endorser. (Johnson v. Tully, 214.)

4. SAME—ENDORSERS ENTITLED TO NOTICE OF DEMAND AND NON-PAYMENT BY MAKERS UNLESS SAME IS WAIVED.—First endorsers are entitled to notice of demand and non-payment by makers unless this is waived. (Johnson v. Tully, 214.)

5. SAME—PRINCIPAL AND AGENT—WAIVER OF PROTEST BY PERSON IN CHARGE OF BUSINESS OF INDORSERS AND WHO DEMEANS HIMSELF AS GENERAL AGENT IS SUFFICIENT TO BIND INDORSERS.—Where the

NEGLIGENCE (Continued).

bookkeeper of the indorsers was ostensibly in charge of their business during their absence from the city and demeans himself as general agent waiver of protest by him is binding upon his employers. (Johnson v. Tully, 214.)

See Husband and Wife, 2.

NEW TRIAL. See Appeal and Error, 10, 19, 21; Continuance 2.

NON-SUIT. See Negligence, 2.

NOTICE OF APPROPRIATION. See Irrigation, 14.

OFFICE AND OFFICERS.

1. OFFICE AND OFFICERS—SALARIES—DE FACTO OFFICERS.—Where a county has paid to a *de facto* officer, holding under color of title, salary for the time actually spent in performance of his duties such payment is complete defense to suit for the same salary by the *de jure* officer. (Shaw v. County of Pima, 399.)

OFFICERS.

1. OFFICERS—COUNTY TREASURER—CUSTODIAN OF PUBLIC FUNDS—TRUSTEE FOR THE BENEFIT OF WHATEVER BRANCH OF THE GOVERNMENT MAY HAVE FUNDS WITH HIM—FAILURE TO PAY OVER FUNDS SUBJECTS HIM AND SURETIES TO ACTION—LAWS OF 1883, p. 157—TERRITORY AND COUNTY EACH HAVE RIGHT OF ACTION ON BOND—SHORTAGE IN GROSS FUND BELONGING TO BOTH TERRITORY AND COUNTY—EQUITY REQUIRES THAT EACH SHOULD BEAR ITS PROPORTION OF THE LOSS.—The county treasurer is a county officer, and for some purposes he is the agent of the county, but as to funds in his hands he is, in the same sense, an agent of any branch of the government whose funds he may have. He is rather the custodian of funds which he may have officially, and the trustee for the benefit of whatever branch of the government may have funds with him. A failure by the treasurer to pay over funds to whomsoever has the legal right to receive them will subject him and his sureties to action, "by the territory, or any person injured or aggrieved." Statute, *supra*. The territory and county have each the right to recover on his official bond. Where the present treasurer has in his hands a gross sum less than the amount due both territory and county, and the shortage is due from his predecessor who defaulted, equity requires that each should bear its proportion of the loss. (Territory v. Bashford, 246.)

PARAMOUNT TITLE. See Mines and Mining, 2.

PARTIES. See Assignment for Benefit of Creditors, 1; Fraudulent Conveyances, 1; Irrigation, 1.

PARTNERSHIP. See Cropping Agreement, 1; Executors and Administrators, 1.

PLEADING.

1. PLEADING—ACTION AGAINST DRAWER ON BANK CHECK—COMPLAINT MUST ALLEGE EITHER DEMAND AND NOTICE OR FACTS EXCUSING FAILURE.—In a complaint against the drawer of a bank check or bill of exchange, so-called, it is necessary to aver either demand and notice to the drawer of non-payment, or such facts as would excuse demand and notice. (Dowling v. Hunt, 8.)

2. PLEADING—DILATORY PLEAS AND MOTIONS—MUST BE FILED PROMPTLY OR RIGHT LOST.—All dilatory pleas or motions must be pleaded in apt time,—that is, at the earliest practicable moment,—or the right to plead or make the motion will be waived. (Muldoon v. Place, 4.)

3. PLEADING EVIDENCE—OBNOXIOUS TO SPECIAL DEMURRER.—Evidence must not be pleaded; only the general or ultimate facts need be alleged. Pleading evidence bad, and obnoxious to special demurrer. (Hobson v. R. R. Co., 171.)

See Appeal and Error, 13, 14; Counties, 4; Mines and Mining, 3; Sheriffs, 1; Suit to Quiet Title, 1.

POLICE POWERS. See Constitution Law, 2.

POLYGAMY. See Criminal Law, 14 16, 20.

POWER OF ATTORNEY.

1. POWER OF ATTORNEY—AUTHORITY TO RECEIPT FOR WARRANT—CANNOT BE ASSIGNED.—An instrument in the nature of a power of attorney authorizing a certain party to receipt for warrant cannot be assigned *Quaere*: If it contained words of negotiability would it be transferable? (King v. Hawkins, 358.)

PRACTICE.

1. PRACTICE—MOTION TO DISMISS FOR WANT OF COST BOND DILATORY—RIGHT TO MAKE MOTION LOST AFTER DEMURRER FILED.—A motion to dismiss for want of a bond for costs is a dilatory motion, and if not interposed in the first instance is waived. After filing a

PRACTICE (Continued).

demurrer it is then too late to ask for and require plaintiffs to file a bond for costs, and it is error to allow defendants' motion to dismiss for want of cost bond. (Muldoon v. Place, 4.)

2. PRACTICE—TRIAL OF CAUSES UNDER FEDERAL STATUTES—IN ABSENCE OF CONGRESSIONAL ENACTMENT AS TO MATTERS OF PRACTICE LOCAL STATUTES PREVAIL.—Where in matters of practice the statutes of the United States are silent, in the territory or state where United States courts are held for the trial of causes under the United States laws, the local statutes may be invoked for the purpose of interpreting the law governing the practice and conducting the proceedings of the court. (United States v. Tenney, 29.)

See Appeal and Error, 15, 18; Damages, 1; Findings of Fact, 1; Mortgages, 3; Verdict, 1.

PRESCRIPTION. See Irrigation, 4.

PRESUMPTIONS. See Appeal and Error, 1; Assignment for Benefit of Creditors, 2; Fixtures, 1; Grand Jury, 1; Judgment, 1.

PRESUMPTIVE FRAUD. See Fraudulent Conveyances, 5, 6.

PRINCIPAL AND AGENT.

1. PRINCIPAL AND AGENT—AGENT CONTRACTING WITH RESPECT TO MATTER OF AGENCY FOR INDIVIDUAL BENEFIT—ACTING AS AGENT FOR BOTH PARTIES—WHERE CONTRACT IS ENTERED INTO FOR FRAUDULENT PURPOSE EQUITY WILL REFUSE ALL PARTIES AFFIRMATIVE RELIEF.—Where an agent for the sale of a mine makes a contract with respect thereto for his individual benefit, and further attempts to represent both parties to the transaction, in an action to enforce such contract a court of equity will refuse relief and will leave the parties in the position in which it finds them. (Jacobs v. George, 93.)

See Negotiable Instruments, 2, 5.

PRINCIPAL AND SURETY.

1. PRINCIPAL AND SURETY—DEFALCATION—FALSE REPORT BY PRINCIPAL—SURETIES ESTOPPED.—In an action upon a treasurer's official bond to recover a shortage his sureties are estopped from denying the truth of their principal's reports, as to amount of money on hand made just prior to the execution of the bond and during its life, for the purpose of showing that the defalcation occured during his previous term. (Territory v. Cook, 383.)

PRIVILEGE. See Criminal Law, 9.

PROCESS.

1. PROCESS—DEFECTIVE SERVICE WAIVED BY FILING OF ANSWER.—A party having answered, and having had his day in court, should not be allowed to reverse all the proceedings because of irregularity in service. (Hobson v. R. R. Co., 171.)

PUBLIC LANDS.

1. PUBLIC LANDS—LAND OFFICE—POWER OF COURT TO REVIEW ACTION OF IN GRANTING PATENT LIMITED—COURT OF EQUITY MAY GRANT RELIEF IN CASES OF FRAUD UPON CONTESTANT OR DEPARTMENT OR MISTAKE OF LAW BY DEPARTMENT.—Where there has been a contest over issuance of patent and the land department has determined that patent shall issue to one of the contestants the courts have no right or power to interfere unless it can be shown that fraud or imposition was practiced upon the complaining contestant, or upon the land department, or that its officers have clearly mistaken the law applicable to the case. (Jeffords v. Hine, 162.)

2. SAME— SAME—FINDINGS OF FACT BY DEPARTMENT CONCLUSIVE UPON COURTS.—The land department is a tribunal, appointed by Congress to decide questions like this, and when finally decided by the officers of that department the decision is conclusive everywhere else, as regards questions of facts. (Jeffords v. Hine, 162.)

3. SAME—SAME—FINDING THAT OFFICER IS SUCH DE FACTO IS MIXED FINDING OF LAW AND OF FACT—RECEIVER AS DE FACTO REGISTER—WHAT CONSTITUTES INCUMBENT OFFICER DE FACTO—RIGHT TO OFFICE CANNOT BE TRIED COLLATERALLY—ACTS OF DE FACTO OFFICER VALID.—The question whether Daly, receiver, was the register *de facto* was before the department, and if not purely a question of law or of fact, it was clearly a mixed question of law and fact, and when decided, was at rest under the decisions cited. Where under some designation the receiver undertook to exercise, and did exercise and discharge the duties and powers of register, his absolute legal right to the office cannot be tried in a collateral manner between third parties. Whatever might be said of the acts of a mere intruder, without any claim or color of title, it is well settled that when a person actually obtains an office, with the legal *indicia* of title until ousted, his official acts are as valid as if his title were not disputed. (Jeffords v. Hine, 162.)

4. PUBLIC LANDS—TOWNSITE ENTRY ON LAND NOT KNOWN TO BE MINERAL PRIOR TO AFTER ACQUIRED MINING CLAIM.—A town-site entry upon land not known to be mineral land at the time of entry is

PUBLIC LANDS (Continued).

prior to any after acquired mining claim. (Reilly v. Berry et. al., 272.)

5. SAME—MINES AND MINING—TOWNSITE ENTRIES—MINING LOCATIONS—CONFLICTING CLAIMS.—All mines, mining claims, and possessions held under existing laws are excluded from the terms of a town site patent, and such as are located prior to the town site entry are paramount thereto. Lands known to be mineral lands at the time of the town site entry are not included in such town site entry. (Reilly v. Berry et al., 272)

6. PUBLIC LANDS—TOWNSITE ENTRIES—CANNOT ACQUIRE TITLE TO MINERAL LAND UNDER.—Title to known mineral land cannot be acquired under the town site laws. (Reilly v. Berry et al., 272.)

7. PUBLIC LANDS—TOWN SITE ENTRIES—§ 2387 REV. ST. U. S. 1878 PROVIDES FOR ENTRY IN TRUST—EXECUTION OF TRUST AS TO DISPOSAL OF LOTS TO BE UNDER TERRITORIAL REGULATIONS—SPECULATIVE CONVEYANCE, BREACH OF TRUST—NO POWER TO CONVEY BUT TO OCCUPANTS—PURPOSE OF U. S. STATUTE TO PREVENT SPECULATION—§ 11, COMP. LAWS, 1877, CONSTRUED AND HELD VOID—TOWN SITE COMPANIES.—Act of Congress (Rev. St. U. S. 1878, Section 2387) provides that the "corporate authorities" may enter at the proper land office land settled and occupied, in trust for the several use and benefit of the occupants thereof; and that the execution of such trust as to the disposal of the lots shall be under such regulations as the state or territory may by law provide. The deed by Randall, Mayor, of 2168 lots out of 2394 to four persons, not in severalty as occupants, but as tenants in common, was a violation of the trust imposed upon him by law. He had no power to convey title to any one but to occupants. Any act of the legislature which would create a breach of such trust is void. § 11, c. 89, p. 585, Comp. Laws, 1877, attempting to give a town company or persons who select or lay out a town site any advantage over any other occupant, reviewed and held inoperative. (Clark v. Titus, 147.)

PUBLIC OFFICERS.

1. PUBLIC OFFICERS—ASSIGNMENT OF UNEARNED SALARY.—An attempted assignment by a public official of his unearned salary is void as against public policy. (King v. Hawkins, 358.)

2. PUBLIC OFFICERS—EARNED SALARIES—PROTECTION OF AUDITOR.—As a matter of public policy assignments of officials' *earned* salaries ought to be regarded as void, especially for the protection of auditing officers, who should only be compelled to draw his warrant to the officer named in the statute. (King v. Hawkins, 358.)

RAILROADS.

1. RAILROADS—RIGHT OF WAY—EASEMENT—ABANDONMENT.—The grant of a right of way to a railroad is the grant of an easement and not of a fee. Upon abandonment of its line the right of way so abandoned would revert to the grantor. (A. & P. R. R. Co. v. Lesueur, 428.)

2. SAME—TAXATION—FRANCHISES—FEDERAL AGENCY—POWER OF TERRITORY TO TAX—ART. 1, SEC. 8, CONST. U. S.; REV. ST. U. S. 1878, SECS. 1850, 1851; COMPILED LAWS ARIZONA 1877, SEC. 2005, CITED.—Under the powers delegated to Congress and the Territories by the constitution and statutes, *supra*, this territory has the right to tax franchises, whether they be Federal agencies or the means of interstate commerce. (A. & P. R. R. Co. v. Lesueur, 428.)

3. SAME—SAME—ROLLING STOCK—SITUS.—Where a railroad uses rolling stock in a county such personal property is subject to taxation where used. (A. & P. R. R. Co. v. Lesueur, 428.)

4. RAILROADS—RIGHT OF WAY—14 U. S. ST. AT LARGE, 292—IMPROVEMENTS TAXABLE.—Where the charter of a railroad company exempts the right of way within the territories of the United States, statute, *supra*, the exemption is limited by the letter of the law and does not extend to improvements thereon. (A. & P. R. R. Co. v. Lesueur, 428.)

RAPE. See Criminal Law, 25.

REASONABLE TIME. See Fraudulent Conveyances, 5; Irrigation, 14.

REASONABLE USE. See Irrigation, 9.

RECOLLECTION. See Criminal Law, 23.

RECORD. See Appeal and Error, 15, 16; Criminal Law, 10; Judgment, 1.

REGISTRATION. See Election Contest, 1.

REHEARING. See Appeal and Error, 18.

RELEASE. See Joint Debtors, 1.

RELOCATION. See Mines and Mining, 2.

REMEDIES.

1. REMEDIES—ELECTION CONTEST—MANDAMUS NOT PROPER REMEDY—Mandamus is not a proper remedy to contest an election. (Territory v. Mohave County, 248.)

REPUTATION. See Criminal Law, 22, 25; Negligence, 1.

RES ADJUDICATA. See Mines and Mining, 7.

RES GESTAE. See Criminal Law, 5.

RIGHT OF WAY. See Railroads, 1, 4.

RIPARIAN RIGHTS. See Irrigation, 10, Water and Water Courses, 1.

ROLLING STOCK. See Railroads 3.

SALARIES. See Office and Officers, 1.

SALES.

1. SALES—CHATTELS—DELIVERY TO AVOID STATUTE OF FRAUDS—COMP. LAWS ARIZ. 1877, p. 363, par. 2128 CITED.—The acts that will constitute delivery of a chattel vary and depend upon the character and quantity of the property sold as well as the circumstances of each particular case. The same acts are not necessary to the delivery of a ponderous article as would be required in an article of small bulk. (Gant v. Broadway, 315.)
2. SALES—DELIVERY OF CHATTEL IN HANDS OF BAILEE—TRANSFER OF RIGHT OF POSSESSION CONSTITUTES DELIVERY.—Transfer of title and right of possession of bulky chattels in the hands of bailee constitute delivery. (Gant v. Broadway, 315.)

SATISFACTION. See Accord and Satisfaction, 1.

SEPARATE PROPERTY. See Husband and Wife, 1, 2, 3, 4, 5.

SET-OFF AND COUNTERCLAIM.

1. SET-OFF AND COUNTERCLAIM—SUITS BY UNITED STATES—REV. ST. U. S. 1878, SEC. 951, CONSTRUED—EVIDENCE.—In a suit by the United States against an individual under Sec. 951, *supra*, a claim for credit, submitted to the accounting officers of the treasury and disallowed in whole or in part may be pleaded as a counterclaim. Under this section legal evidence to prove the claims is admissable.

SET-OFF AND COUNTERCLAIMS (Continued).

By Sec. 886 Rev. St. U. S. 1878, authenticated transcripts are properly received as evidence. (United States v. Hart, 415.)

2. SAME—SAME—WHAT CONSTITUTES PROPER SET-OFF—REJECTION OF CLAIM—ACCOUNTING OFFICERS—ACTION OF BUT PRIMA FACIE EVIDENCE.—The purchase of supplies by order of the commissioners of Indian Affairs and the performance of certain services and the incurring of certain expenses all in a proper account, with vouchers presented to and rejected in whole or in part by the proper accounting officers, is a proper set-off in a suit by the government. The action of the accounting officers is only *prima facie* evidence, and not final. (United States v. Hart, 415.)

SHERIFFS.

1. SHERIFFS—ACTION AGAINST—FOR ABANDONMENT OF LEVY—PLEADING—EVIDENCE.—Pleadings and evidence in action against sheriff for abandonment of levy of attachment whereby plaintiff lost collection of judgment reviewed. (Mooney v. Broadway 107.)

2. SAME—ATTACHMENT—RIGHTS OF ATTACHING CREDITORS IN MORTGAGED CHATTELS—STATUTES CITED—COMP. LAWS 1877, c. 82, § 4, p. 615—SAME c. 82,. par. 3648, § 5, p. 615—RIGHT OF CREDITOR TO EXERCISE OPTION AS TO PAYING MORTGAGEE OR LEVYING ON EQUITY OF REDEMPTION—OFFICER CANNOT COMPEL HIM TO TAKE ONE COURSE TO EXCLUSION OF OTHER—DUTY OF SHERIFF TO MAKE WRIT EFFECTIVE WITHOUT SPECIAL INSTRUCTIONS.—Where there has been no foreclosure the creditor has under stautes, *supra*, the option either to seize the entire property covered by the mortgage, paying the amount due thereon, or to levy simply on the right or equity of redemption. This option is for the benefit of the creditor, and to be exercised as he may deem to his interest. The officer should not be permitted to compel him to take one course to the exclusion of the other, and so destroy the option the statute allows him. It is the sheriff's duty aside from any special instructions, to make effective the writ placed in his hands, and which he undertakes to execute. (Mooney v. Broadway, 107.)

STARE DECISIS.—See Husband and Wife, 5.

STATUTES.

1. STATUTES—CONSTRUCTION—RECONCILIATION OF ACTS PASSED AT SAME TIME—LAWS 1885, ACT NO. 75, p. 138, § 31, AND LAWS 1885, ACT NO. 105, p. 293, § 13 AND § 19, RELATING TO THE SALARY OF CERTAIN COUNTY OFFICIALS, CONSTRUED—DUTY OF COURTS TO HARMONIZE INCONSISTENT STATUTES.—Where plaintiff had acted as pro-

STATUTES (Continued).

bate judge and county school superintendent of Yavapai County he was entitled under the statutes *supra*, to compensation from both the "General Salary Fund" and the "School Fund." These statutes were passed at the same session of the legislature and approved the same day. Statutes passed on the same day and to take effect at the same time will all be assumed to have been enacted at the same time and are to be construed as of one act. Such construction should be given if possible, as shall leave all to stand. If this cannot be done, only so much is to be disregarded as cannot stand. Distinct affirmative propositions should stand as against mere negations or provisos. The courts are continually called upon to revise the results of careless legislation. This they must do as best they can by known rules of construction. (Territory v. Wingfield, 305.)

STATUTE OF FRAUDS. See Sales 1.

STATUTE OF LIMITATIONS. See Limitations of Actions; Suit to Quiet Title, 2.

SUBSTANTIAL RIGHT. See Appeal and Error, 20.

SUIT TO QUIET TITLE.

1. SUIT TO QUIET TITLE—PLEADINGS—GOVERNED BY CHANCERY RULES—LAWS 1881, p. 116, SEC. 1, CONSTRUED.—Where a complaint in a suit to quiet title fails to allege possession or right to possession in plaintiff it is subject to general demurrer unless it alleges the inadequacy of remedies at law or other grounds for equitable relief. Being a bill in equity it is governed by the rules of chancery pleading. The statute of 1881 enlarged the remedies of the owner of the true title by enabling him to apply for equitable relief even when out of possession but he must bring himself within the rules of chancery pleading. (Ely v. N. M. & A. R. R. Co., 420.)

2. SUIT TO QUIET TITLE—WHO MAY MAINTAIN—ADVERSE POSSESSION UNDER COLOR OF TITLE—HOLDING UNDER WILL—WHEN STATUTE COMMENCES TO RUN.—An action to quiet title may be maintained by one in adverse possession, under claim and color of title, even though his title be equitable and not at law, and a legal title less than a fee. Where plaintiff claims title by possession and shows that he holds as the heir of his mother who claimed under the will of her husband who died in possession in 1873 more than eleven years before, he is entitled to judgment, the statute of limitations commencing to run from the date of the mother's possession under the will. (Pacheco v. Wilson, 411.)

SUPREME COURT. See Court, 1.

SURPLUSAGE. See Criminal Law, 14, 16.

TAXATION.

1. TAXATION—CHAPT. 33 COMP. LAWS 1877—§§4, 5, 18, CITED—NET PROCEEDS OF MINES par. 2062 to 2073, COMP. LAWS 1877, CITED—REPEALED BY ACT NO. 40 AND ACT NO. 77, LAWS OF 1881—CHAPT. 33, COMP. LAWS OF 1877 REPEALED CHAPT. 33 HOWELL'S CODE, COMP. LAWS 1864, p. 312—EXEMPTIONS.—No property within the territory is exempt from the operation of these revenue laws, unless put beyond them designedly and unequivocally by the legislature or other sovereign power. (Waller v. Hughes, 114.)

2. SAME—MINES TAXABLE AS REAL ESTATE—"REAL ESTATE" AS USED IN REVENUE ACT INCLUDES "MINES"—"MINES" INCLUDES PATENTED CLAIMS AND CLAIMS WHERE THE PURCHASE MONEY HAS BEEN PAID AND THE PATENT IS NOT YET ISSUED BY THE GOVERNMENT—"MINING CLAIMS" OR "MINING INTERESTS" REGARDED AS PERSONALTY AND TAXABLE UNDER THE REVENUE ACT.—"Mines," to which patents have been issued are clearly within the definition of the word "lands," and also "real estate," as used in this act, which terms are defined in Chapt. 1, Compiled Laws 1877, and are subject to taxation as real estate. So also mining claims where the occupants have paid to the proper officer of the United States the purchase money therefor, although patent may not have issued; in such cases, by the payment of the money and the acceptance of it by the government, the land is his, the government holding the legal title in trust. "Mining claims" or "mining interests" as used in the revenue act includes that large class of cases where the occupants of mining property do not claim any ownership whatever in the lands in their possession. They simply enter upon the public lands and make improvements thereon, which, while the possession is tolerated by the government, are looked upon as valuable property. This property is subject to taxation under the head of personal property. (Waller v. Hughes, 114.)

3. SAME—WITHOUT ASSESSMENT TAXES ARE NULLITIES—ARBITRARY ASSESSMENT WITHOUT REFERENCE TO ACTUAL VALUE VOID.—Where it appears that the assessor arbitrarily listed mining claims at $500, without reference to the actual value thereof and without knowledge of such real value, such assessment cannot be upheld. Taxes by valuation cannot be apportioned without assessment. Moreover, it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follows it.

TAXATION (Continued).

Without an assessment they have no support, and are nullities. (Waller v. Hughes, 114.)

4. SAME—ASSESSMENT SHOULD BE OF TRUE CASH VALUE.—Assessment in this class of cases should be, as in all others, of the true cash value. (Waller v. Hughes, 114.)

5. TAXATION—EQUITABLE RELIEF—ADEQUATE REMEDY AT LAW—COMP. LAWS ARIZ. 1877, p. 340, par. 2021 CITED—BOARD OF EQUALIZATION—ERRONEOUS ASSESSMENT—PRESUMED TO KNOW WHEN ASSESSMENT ROLL IS COMPLETE—COMP. LAWS ARIZ. 1877, p. 340, par. 2020 CITED—LACHES.—A complaint for injunction against the collection of taxes based on erroneous assessment does not show any ground for equitable relief where it appears that provision is made by statute, *supra*, for protection of the tax-payer against unjust assessments, by the creation of a board of equalization, and that the complainant has failed to resort thereto. The fact that he had no knowledge of the increase in assessment cannot avail for he is charged with knowledge that the assessment roll is complete in ample time to appear before the board, statute, *supra*, and by his own laches he cannot lay foundation for the jurisdiction of a court of equity. (Campbell v. Bashford, 344.)

6. TAXATION—EXEMPTION STATUTES—CONSTRUCTION.—Exemption from taxation is an exception to the general rule that all property shall b taxed equally and is subject to the strictest construction. (A. & P. R. R. Co. v. Lesueur, 428.)

See Intoxicating Liquors, 1; Railroads, 2; Telegraph Lines, 1.

TELEGRAMS.

1. TELEGRAMS—DELAYS IN DELIVERING MESSAGES—GROSS NEGLIGENCE—DAMAGES—CONTRACT LIMITING LIABILITY.—Plaintiff, as assignee of Hudson & Co., bankers, brings this action to recover damages for delay in delivering a telegram. Plaintiff, on the evening of the assignment, delivered a telegram to defendants with instructions to forward it immediately to a branch house of assignors. The agent of defendant received the message in ample time to deliver it before banking hours in the morning, but withheld it. The bank opened and defendant's agent withdrew money belonging to himself and his company. Other depositors also withdrew funds. The message was then delivered and the bank remained open for a half hour longer. Certain terms limiting liability were affixed to the message. *Held*, that defendant's agent was guilty of gross negligence and palpable misconduct; that no terms annexed to the message could excuse the same, and that the company was liable for

TELEGRAMS (Continued).

all money withdrawn prior to the time of the delivery of the message but not for such as was voluntarily paid out thereafter.

BARNES, J., dissenting. The act of the agent in withholding the message being wilfull the defendant was liable for all injury consequent upon the wrong. Punitive damages would have been proper. (Stiles v. Telegraph Co., 308.)

TELEGRAPH LINES.

1. TELEGRAPH LINES—TAXATION.—Where telegraph lines are built by railroad on a right of way exempted by its grant they are nevertheless taxable. (A. & P. R. R. Co. v. Lesueur, 428.)

TERRITORIES.

1. TERRITORIES—EXTENT OF LEGISLATIVE POWER—LIMITATIONS—PROVISIONS OF CONSTITUTION OF UNITED STATES—BILL OF RIGHTS—UNIFORM OPERATION OF LAWS—R. S. ARIZ. 1887, p. 515, par. 2858, CITED.—The principle of uniformity is differently stated in various state constitutions, which must each be construed by their terms. The territories have no such constitutional restrictions. Their legislative power is only limited by the constitution and laws of the United States. It would be inconsistent with the constitution for a territory to levy an excise tax that is lacking in the requirement of uniformity, though it would be otherwise as to a direct tax. The so-called bill of rights of this territory is no more than any other legislative enactment and can make no limitation upon the powers of the legislature. An act which acts uniformly upon all of a class has a uniform operation within the meaning of R. S. Ariz. 1887, p. 515, par. 2858, cited. (Territory v. Connell, 339.)

TOWNSITE ENTRY. See Public Lands, 4, 5, 6, 7.

TRANSCRIPT. See Appeal and Error, 23.

TRIAL.

1. TRIAL—CONTINUANCE—GRANTING DISCRETIONARY—WILL BE REVIEWED FOR ABUSE—ABSENCE OF WITNESSES—AFFIDAVIT MUST SHOW THE FACTS PROPOSED TO BE PROVEN CLEARLY, THAT THEY ARE MATERIAL AND WHERE A WITNESS IS TO BE CONTRADICTED THAT HIS TESTIMONY IS FALSE.—Granting of continuance is discretionary with the trial court. For abuse of discretion error may be assigned, and the cause reversed. The showing for continuance on account of absence of witnesses must clearly state the facts which defendant expects to prove by said absent witnesses and such facts must be made to appear material. If it is expected to contradict anticipated

TRIAL (Continued).

testimony then the fact that such testimony is false should be stated. (Territory v. Barth, 319.)

2. TRIAL—FINDINGS UPON MATTER NOT IN ISSUE VOID.—A finding, both of law and of fact, made upon issue not raised by either complaint or answer error; it is *coram non judice.* (Dalton v. Rentaria, 275.)

3. TRIAL—INSTRUCTIONS TO JURY—IGNORING EVIDENCE.—Where the evidence tends to show that money was deposited with defendants by plaintiff for safe keeping and defendants requested the use of the money, if they needed it, but had not used it, an instruction to the jury that if they believed that defendants had made such request and that it was for the benefit of defendants then the relation of bailor and bailee was changed to debtor and creditor whether the money was in fact used or not was erroneous. (Carlyou v. Fitzhenry, 266.)

4. TRIAL—SUIT IN EQUITY—VERDICT OF JURY ADVISORY.—In a suit in equity a verdict of the jury is only advisory. (O'Toole v. Melander, 392.)

TRUST. See Limitation of Actions, 3.

UNITED STATES COMMISSIONERS.

1. UNITED STATES COMMISSIONERS—POWER TO ISSUE WARRANTS—§ 1014 U. S. REV. ST. 1878—JURISDICTION—ORDINARILY CONFINED TO DISTRICT—U. S. STATUTE CONFERS JURISDICTION CO-EXTENSIVE WITH TERRITORIAL LIMITS.—As a matter of proper practice United States Commissioners should, in ordinary cases, confine the exercise of their jurisdiction to the geographical limits of their district. Rev. St. U. S. *supra,* confers power upon commissioners to issue warrants in cases for the violation of the Federal Statutes. This provision, in connection with other acts of Congress, expresses the intent of Congress to confer upon commissioners jurisdiction co-extensive with the limits of the territory or state. (Tidball v. Williams, 50.)

VENUE.

1. VENUE—APPEAL AND ERROR—CHANGE OF VENUE UPON CREATION OF NEW COUNTY—APPEARANCE WITHOUT OBJECTION WAIVES QUESTION AS TO WHETHER CHANGE WAS AUTHORIZED—LAWS 1881, p. 156, CITED.—Where an act, *supra,* provides for the creation of a new county and further provides that causes may be removed from the court wherein pending to the court in such new county, it is too

VENUE (Continued).

late for party to object upon appeal to an order transferring the cause, he having appeared in such latter court without objection. (Solomon v. Norton, 100.)

VERDICT.

1. VERDICT—UNCERTAINTY—PRACTICE TO REMEDY—NOT CURED BY JUDGMENT.—Where a verdict is too uncertain to justify judgment the jury may be requested to retire and put it in proper form, but where the verdict is bad for uncertainty it cannot be corrected or cured by judgment. (Bashford v. Kendall, 6.)

See Appeal and Error, 24; Equity, 1; Jury, 1; Trial, 4.

VOTERS. See Election Contest, 1.

WAIVER OF PROTEST. See Negotiable Instruments, 4, 5.

WARRANT. See False Imprisonment, 1.

WATER AND WATER COURSES.

1. WATER AND WATER COURSES—RIPARIAN RIGHTS—APPROPRIATION—VESTED RIGHTS—OWNERSHIP OF LAND IMMATERIAL TO RIGHT OF APPROPRIATION.—Riparian rights are the same in Arizona as elsewhere, wherever they apply, but they are subject to intervening rights of prior appropriators, who acquire vested rights in waters. It is immaterial whether or not plaintiffs owned their land at the time their appropriation was initiated. (Hill v. Lenormand, 354.)

See Irrigation Passim.

Ex. J. M.
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